

MOTION FILED
SEP 21 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
NO. 75-708

STANLEY MARKS, HARRY MOHNEY,
GUY WEIR, AMERICAN AMUSEMENT CO., INC.,
and AMERICAN NEWS CO., INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Motion for Leave to File Brief of Citizens for
Decency Through Law, Inc., as Amicus Curiae in
Support of the Respondent United States of
America, With Brief Annexed.

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Support of the Respondent United States of
America.

Interest of Amicus Curiae.

Citizens for Decency through¹ Law, Inc.,
hereinafter referred to as C.D.L. respectfully

¹/Citizens for Decency through Law, Inc. (formerly
Citizens for Decent Literature, Inc.) an Ohio
Corporation, with local affiliates throughout the
United States, is a non-profit, non-sectarian,
and non-political corporation with national head-
quarters in Cincinnati, Ohio, formed for and dedi-
cated to the support of this nation's obscenity
laws by cooperating with law enforcement in the
enforcement of the obscenity laws.

requests leave of Court, under Rule 42.2 of the Revised Rules of the Supreme Court of the United States, to appear as amicus curiae and to file a brief in support of the United States of America, the Respondent in the above-entitled cause.

C.D.L.'s request, at this late date, to appear as amicus curiae on behalf of the Respondent United States of America, arises out of its having received information that, approximately two months ago, the Solicitor General of the United States filed a Brief on the Merits for the Respondent United States of America, which concedes error on the part of the Court of Appeals for the Sixth Circuit below, and urges reversal of the judgment and remand of the case for retrial.^{2/}

^{2/}On November 13, 1975, Petitioners in the above-entitled cause filed their petition for a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit to review the opinion and judgment in U.S. v. Stanley Marks et al., 520 F.2d 913, (July 30, 1975) which, in a 2-1 decision (Weick and Engel, with McCree dissenting) had affirmed the judgment of conviction entered by U.S. District Judge Mac Swinford in October of 1973. That petition presented three questions:

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in Miller v. California and its companion cases are entitled to jury instructions founded upon the Roth-Memoirs obscenity formulation prevailing at the time of their conduct?

Thereafter, moving party herein obtained a copy of Respondent's Brief on the merits and, after an examination of its contents, was satisfied that the concession of the Solicitor General constitutes serious error, and that the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

The Solicitor General's willingness to concede error has created a void and has deprived the

2. Whether an appellate court, in performing its duty enunciated in Jacobellis v. Ohio, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?

3. Whether a jury may be instructed to determine the issue of obscenity on the basis of community standards based upon a community comprised of the precise geographical boundaries of a federal judicial district when all of the jurors are both drawn from and constantly exposed to the influences of other communities?

On March 1, 1976, this Court granted a writ of certiorari in Stanley Marks et al. v. U.S. U. S. ___ 47 L.Ed.2d 347 ___ S.Ct. ___ (Mar. 1, 1976) and on May 14, 1976, Petitioner Stanley Marks et al. filed their Brief on the merits. On or about July 9, 1976 the Solicitor General Robert H. Bork filed a Brief for the Respondent United States of America wherein he conceded error and urged that the judgment of the Court of Appeals should be vacated and the case remanded to the Court of Appeals for viewing of the films and, on further reconsideration, further remand to the U.S. District Court for a new trial under the Roth-Memoirs standards.

people of full representation in support of the judgment of the Court of Appeals below, and this Court of the "adversary" type of advocacy which is essential to a correct determination of the proper rule of law.

If the Solicitor General's concession is to be given effect, the resulting rule of law will deal a major blow to the federal government's efforts to apply obscenity controls in pending prosecutions and in convictions presently on appeal.^{3/}

Moving Party contends that the most significant issue in this case is that which has been designated as Question 1 in the Petition for a Writ of Certiorari; namely,

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in Miller v. California and its companion cases are entitled to jury instructions founded upon the Roth-Memoirs obscenity formulation prevailing at the time of their conduct?

The Solicitor General has taken the position in the Respondent's Brief on the Merits, that the trial court erred in instructing the jury on ^{3/}See Daily and Weekly Variety news articles, reporting on the Solicitor General's actions, at Exhibit "A" to the Brief herein.

"Miller" standards, and was required to instruct the jury in what has generally (and erroneously) been described as "Memoirs" standards. C.D.L. contends that the trial court was correct.

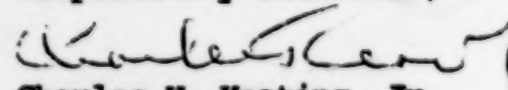
Moving party disagrees with the position taken by the Solicitor General on Question 2, and contends that the Court of Appeals was correct in its findings that the record is sufficient, and that there was no need to examine the films.

On Question 3, moving party agrees with the Solicitor General's position that the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place.

Additional arguments in support of this motion appear at the Introduction to the Brief Amicus Curiae, annexed hereto.

It is submitted that the arguments presented herein are of primary importance and should be considered by this Court in ruling on the merits. It is respectfully requested that permission be granted under Rule 42.2 to file the within tardy Brief Amicus Curiae in support of the Respondent United States of America.

Respectfully submitted,


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of America.

INTRODUCTION

C.D.L. contends that the Solicitor General's analysis as to Question 1 is prejudicially in error in a number of particulars. See Brief Amicus Curiae, hereinafter, at Point I A through I L (pages 21 - 54). With particular reference to Point I A (See pages 21 - 26), C.D.L. submits that the analysis of the Solicitor General is fundamentally unsound in its willingness (1) to accept

without question and continue the error of long standing duration (10 years) regarding what Justices Brennan, Warren and Fortas actually said in their opinion in the Civil Injunction lawsuit, A Book Named "John Cleland's Memoirs of A Woman of Pleasure et al. v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, and (2) to accept the proposition that the "civil" standard of "utterly without redeeming social value" was intended to have the same application in a "criminal" case. The real meaning of the so-called "Memoirs" opinion, authored and concurred in by only those three justices, has been obscured in the 10 years of litigation and confusion which the loose language of that opinion and the configuration of that case has engendered.

The erroneous rule of law announced by the First, Fifth, Ninth and District of Columbia Circuits in U.S. v. Jacobs, 513 F.2d 564 (9th Circuit. 1975), U.S. v. Wasserman, 504 F.2d 1012 (5th Circuit 1974), U.S. v. Sherpix, Inc., 512 F.2d 1361 (D.C. Circuit 1975) and U.S. v. Palladino, 490 F.2d 499 (1st Circuit 1974), upon which the Petitioners herein rely, is the direct result of that confusion. If this Court is to put an end to the "Memoirs" controversy, that mistake must be dealt with in a logical manner; that is, in the background which existed ten years ago,

with this Court reexamining the factual settings, questions presented, and arguments made by counsel in all three of the obscenity cases which were argued as a group and decided as a group during the 1965 October Term. See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975; Ginzburg v. U.S., 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942; and Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (March 21, 1966).^{1/} By reconciling the opinions of the three Justices (Brennan, Warren and Fortas) in

^{1/} The confusion started when all three of the governmental attorneys in the Fanny Hill, Ginzburg and Mishkin cases conceded without argument that there were three separate tests. See transcript of the oral arguments in the Fanny Hill case on Dec. 7, 1966 at page 9. See also, during the following term, "Motion for Leave to File Brief of Citizens for Decent Literature, Inc., an Ohio Corp. as Amicus Curiae and Brief" in Aday et al. v. United States of America, No. 149 (October Term 1966) at page 20 through 32.

In a civil case, (Fanny Hill), the "Memoirs" requirement that the 3 criteria must "coalesce" is consistent with the "Memoirs" requirement that "Each of the three federal constitutional criteria is to be applied independently." Not so, in a criminal case, where the concepts of "coalesce" and "applied independently" are at war with one another, as can be seen from the arguments on "social value" in Ginzburg and the ensuing opinion in that case. (See Brief Amicus Curiae herein, at Appendix B, pages B-35 - B-39.)

Memoirs, with their rulings in Ginzburg and Mishkin, the Memoirs error can be exposed, and a foundation laid for a logical explanation as to why the "utterly without redeeming social value" was never an independent test in criminal cases, and why Judge Mac Swinford was correct in his ruling in Marks v. U.S. To say that Mac Swinford, in the criminal trial below, was required to give a jury instruction that the material must be "utterly without redeeming social value", because of the result and a minority, three judge opinion to that effect in the civil injunction "Memoirs" action, without explaining why that same test was not a requisite in the companion criminal cases of Ginzburg, supra, and Mishkin, supra, decided by the same court on the same date in clear-majority-decisions, is to concede a major point without the necessary foundation having been laid.

In Ginzburg, supra, the terms "redeeming social importance" and "utterly without social importance" were fundamental issues upon which the arguments centered. (See Brief for the Petitioners, Ginzburg et al. at pages 29-33, Point I B "Redeeming Social Importance"; Brief Amicus Curiae of C.D.L. in Support of Respondent at pp. 68-72, Point II E "Social Importance", Point II E-1 "It is not determined in a vacuum", and Point II E-2 "Slight social importance does

not exculpt"; and Reply Brief of Amicus Curiae C.D.L. in Support of Respondent at pages 1-5, Point I "The Government Did Not Concede That Any of the Works had 'Redeeming Social Importance'."). ^{1a/} Yet Justice Brennan who authored the Ginzburg opinion and Justices Warren and Fortas who joined the same, made no reference to the "social importance" requirement, except at page 38, where

^{1a/}Amicus Curiae participated as an Amicus Curiae in all three of the cases which were decided on March 21, 1966. ^{1a} Ralph Ginzburg et al. v. U.S., October Term 1965, No. 42, see:

- (a) Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent.
- (b) Reply Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation in Support of Respondent.

In A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts, October Term 1965, No. 368, see:

- (a) Motion for Leave to File and Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.
- (b) Motion for Special Leave to File and Supplemental Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation, in Reply to Appellant's Supplemental Brief.

In Mishkin v. New York, October Term 1965, No. 49, see:

- (a) Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

Justice Brennan noted:

"And the circumstances of presentation and dissemination of material are equally relevant to determine whether social importance claimed for material in the court room was, in the circumstances, pretense or reality-whether it was the basis upon which it was traded in the market place, or a spurious claim for litigation purposes." (Our emphasis).

Amicus Curiae disagrees with the position taken by the Solicitor General on Question 2, which is phrased in the Petition for a Writ of Certiorari as:

"2. Whether an appellate court, in performing its duty enunciated in Jacobellis v. Ohio, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?"

and contends that the Court of Appeals was correct in its findings that the record is sufficient, and that there was no need for the Court to examine the films. (See Brief Amicus Curiae, hereinafter, at Point II, pages 54-56).

Given the record herein, C.D.L. submits that it is intellectual nonsense to suggest that the Court of Appeals' position "reflected insufficient attention to the First Amendment values

involved" (Brief for the U.S. at p. 35 fn. 20).

On Question 3, moving party agrees with the Solicitor General's position that the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place. The most logical reason for applying that rule is the rationale applied by seven justices of the Court of Appeals, Fifth Circuit, sitting en banc in U.S. v. Groner, 479 F.2d 577 (May 22, 1973) at page 583:

"Our concept of the community is suggested by the declaration of our national policy in the Jury Selection and Service Act of 1968, 28 U.S.C.A. section 1861 (Sup. 1972) from which we quote:

'It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.'" (Emphasis theirs.)

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 520 F.2d 913 (See also Pet. App. at pages A1-A19).^{1b/} The pre-trial memorandum of the trial judge (the late U.S. District Judge Mac Swinford) is reported at 364 F.Supp. 1022 (See 1b/"Pet. App." refers to Appendix A to the petition.

also App. at pages A45-A58).^{2/}

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1975. A petition for rehearing was denied on September 15, 1975. On October 6, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including Nov. 14, 1975. The petition was filed on Nov. 13, 1975 and was granted on March 1, 1976. The jurisdiction of this Court rests upon 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether the U.S. District Court acted properly in charging the jury on the standards announced in Miller v. California, 413 U.S. 15, where both the conduct which was the subject of the criminal charge, and the federal indictment which was thereafter returned, took place prior to the Miller decision?
2. Whether in reviewing an obscenity conviction based upon the exhibition of obscene films, an appellate court is required to view such films, where the appellate court finds and determines from the record that such films are hard-core pornography, and the record clearly supports such finding?
3. Whether the jury was properly instructed
2/"App." refers to the Joint Appendix.

to assess the materials in terms of the community standards of the judicial district from which the jurors were selected and in which the trial was held?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the Constitution provides in pertinent part:

No . . . ex post facto Law shall be passed.

The First Amendment to the Constitution provides in pertinent part:

Congress shall make no law . . .
abridging the freedom of speech, or of the press

The Fifth Amendment to the Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than

\$10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1465 provides in pertinent part:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, laci-vous, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhou-ette, drawing, figure, image, cast, phono-graph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

STATEMENT OF FACTS

1. The Petitioners' Conduct.

In early 1973, the Cinema X Theatre in New-
port, Kentucky, was managed by petitioner Marks.
(Tr. 434, 559-560)^{3/} Petitioner Mohney owned the
Cinema X Theatre and was the sole owner of Ameri-
can Amusement Company, Inc., and American News
Company, Inc., the corporate petitioners herein.
The corporate petitioners had their offices in
Durand, Michigan (G. Exhs. 48, 49). Petitioner

^{3/}"Tr." refers to the transcript of the trial.
"G. Exh." refers to exhibits introduced by the
government at trial. "Pet. App." refers to the
Petition. "App." refers to the Joint Appendix.

Weir was the general manager and president of
American Amusement (G. Exhs. 26, 27, 49).

Petitioner Weir scheduled movies for the
Cinema X, and the booking of those movies was ac-
complished by American Amusement (Tr. 561-566).
Weir also arranged for advertising of the theater
(G. Exhs. 26, 27). Cinema X employees were paid
by petitioner American News (Tr. 122, 437).

The films "Deep Throat" and "Swing High", as
well as a number of previews,^{4/} were shown at
the Cinema X in late January or in February 1973
(Tr. 500-501; G. Exh. 55). They were supplied by
American Amusement and were sent to Cinema X from
either Durand, Michigan, or Clarksville, Indiana
(Tr. 446-448, 450, 459, 461-462, 488-489)^{5/}

2. The Search Warrant, Indictments, and Pre-Trial Motions.

On February 26, 1973, an Assistant United
States Attorney applied to a federal magistrate
for a warrant authorizing the search of the
Cinema X, and the seizure of certain films (App.
10). Special Agent Vernon R. Glossup of the
Federal Bureau of Investigation submitted an
affidavit (App. 14-26), describing in detail the

^{4/} The previews at issue here are entitled "Teen-
age Cowgirls", "Black on White", "A Few Bucks
More", "Memoirs of a Madam", and "Doctor's Disci-
ples."

^{5/} American Amusement owned a theater in Clarks-
ville, Indiana (Tr. 647-648).

film "Deep Throat" and the previews "Teenage Cowgirls", "Black on White", "A Few Bucks More", "Let Me Count the Lays", and "Memoirs of a Madam", which he had viewed at the Cinema X Theatre, 716 Monmouth Street, Newport, KY, on Friday, February 23, 1973 at about 8:00 P.M. Special Agent Ronald F. Selby also submitted an affidavit (App. 11-13) describing in detail the film "Swing High" and the preview "Doctor's Disciples", which he had viewed at the Cinema X Theater on the afternoon of Friday, February 23, 1973. He also stated in his affidavit that he viewed a s... d film "Deep Throat" and the same previews described in Special Agent Glossup's affidavit.

The United States Magistrate notified petitioner Marks that an adversary hearing would be held the next day to determine whether the search warrant would be issued (App. 4-9). After the adversary hearing, the Magistrate issued the search warrant which was executed on February 27, and a return made on February 28 (App. 29-31).

On April 27, 1973, an indictment was returned in the United States District Court for the Eastern District of Kentucky, charging petitioners with conspiracy to transport obscene materials in interstate commerce, in violation of 18 U.S.C. 371, and with transportation of obscene materials in interstate commerce, in violation of 18 U.S.C.

1465 (App. 33-44).

Petitioners made a number of pretrial motions, including a motion to dismiss the indictment, which was denied on Oct. 5, 1973 in a written memorandum (App. 47-52). After rejecting a number of arguments similar to arguments ultimately rejected by this Court in Hamling v. United States, 418 U.S. 87, the District Court rejected petitioners' argument "that since Miller (v. California), 413 U.S. 15) formulated a new test of obscenity, prosecution of (petitioners) for conduct prior to that opinion would invoke the constitutional proscription of ex post facto culpability". The court observed that the Ex Post Facto Clause applies only to Acts of Congress, and stated: (App. 49)

Although Bouie v. City of Columbia, 378 U.S. 347 (1964), did hold that a retroactive application of a court interpretation may offend the Due Process Clause, it is evident that the factors present in the obscenity area render that case easily distinguishable; the Bouie holding should be applied only to decisions which are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" Id. at 354. As admitted by the (petitioners), the previous uncertainty in

the realm of obscenity has only been settled by the recent Supreme Court decisions. The Miller group did not create a new definition of illegal conduct, but merely clarified earlier concepts of obscenity of which the (petitioners) were constructively aware. Rosen v. United States, 161 U.S. 29 (1896); Nash v. United States, (229 U.S. 373); United States v. Wurzbach, (280 U.S. 396). Further, the Court's action in remanding Miller and its accompanying cases to the lower courts for reevaluation in light of the clarified standards intimates that the use of the Miller standard in the case at bar is entirely proper; prospective application would have been decreed if constitutional violation had been feared.

3. The Trial.

The trial commenced on Tuesday, October 9, 1973 and lasted until Friday, October 19, 1973. The films, which were shown to the jury, are described by the Court of Appeals in its opinion (See, *infra*, at page 16).

Petitioners presented the testimony of a psychologist, a minister, a psychiatrist, a sociologist, and an English teacher. These witnesses were of the view that the films were not patently offensive, did not appeal to the prurient interest

under contemporary community standards,^{6/} and had serious artistic, literary, and scientific value (Tr. 353-355, 407-410, 745-755, 812-814, 825-835).

The District Court instructed the jury that the test for obscenity is "(w)hether to the average person, applying contemporary community standards, the film taken as a whole appeals to the prurient interest" (App. 84). The court told the jury that it should find that the materials meet this test if three elements exist (*ibid.*):

- (1) whether the average person, applying contemporary community standards would find that the film, taken as a whole, appeals to the prurient interest in sex;
- (2) whether the film depicts or describes, in a patently offensive way, sexual conduct, including but not limited to ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, and the lewd exhibition of the genitals; and
- (3) whether the film, taken as a whole, lacks serious literary, artistic, political or scientific value.

^{6/} Petitioners' experts based their opinions on standards in the Covington, Kentucky, area where the trial occurred, as well as on standards in Cincinnati, Ohio, Minnesota, Maryland, and the nation as a whole (Tr. 328-329, 334, 348, 393, 739-740, 808).

The jury was instructed on the "average person" requirement as follows (App. 85):

The "average person" is, of course, a hypothetical person. The phrase means a person with an average interest and attitude toward sex: not a libertine, not a prude, not a person who is preoccupied with sex, not a person who rarely if ever thinks about sex, not a person who thinks sex is the most important thing to be discussed. The phrase means a normal individual of average sex instincts; not one who is oversexed, not one who is under-sexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or repelled by sex or ignorant of sex or bored by sex. The phrase means, in short, a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts, and interests toward sex.

The jury was instructed that the "contemporary community standards" to which it should refer are the standards generally held in the Eastern District of Kentucky. The Court enlarged on that instruction in the following manner (App. 86-87):

"Contemporary community standards" means the standards generally held throughout the Eastern District of Kentucky. We are not

measuring this term 'contemporary community standards' directly with what happened in Newport or on Monmouth Street, but it includes the whole Eastern District of Kentucky. You people on the jury are from different parts. Some of you are from Newport, Campbell County, maybe Monmouth Street, I don't know; others of you from out in Boone County, some in Bracken, some in Mason. This District extends to sixty-seven counties in Kentucky, goes throughout the whole eastern district of Kentucky, as I explained that to you when you qualified as jurors. So you are not to say, "Well, a thing like that wouldn't offend a person or even be obscene maybe under some conditions, but on the other hand, there are things we know to some people more prudish that even something of less significance then might be drawn from these films would be considered obscene"

and (App. 88):

"If you find that the films in this Indictment exceed substantially the limits of candor in the description or representation of sex which is acceptable in the Eastern District of (T. 891) Kentucky, then you may find the film to be patently offensive.

"In determining contemporary standards,

you should take into account such things as dress styles, which include hot pants and see-through blouses; topless and bottomless bars; adult theaters which exhibit films dealing candidly with sex matters; adult book stores which sell publications containing pictorial and verbal portrayals dealing with sex; adult motion picture theaters which display films containing explicit, sexual conduct.

"Your own personal and social views on the press materials charged as obscene in the indictment may not be considered. Thus, whether you believe that the press materials are good or bad is of no concern; so too, you may not consider whether in your opinion the press materials are moral or immoral; whether they are likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the press materials, whether they offend or shock you, may not be considered by you. You may think the press materials are immoral, shocking or offensive, and you must acquit the defendants if the press materials are not obscene, as the Court has defined that term for you."

and (App. A94):

"The United States, on the other hand,

says that by the very showing of these films, they show a lack of literary, artistic, political or scientific value of any kind, that they are pure filth and that they are the kind of thing that this statute was passed to keep from being shown in the community. The law makes a distinction by saying that apparently from decisions of the court things that might be shown in one community could not be shown in another community. In other words, a visit to a contemporary community, as I say the Eastern District of Kentucky, and more or less leaves it up to the juries, those charged with making such a decision, as to whether or not it violates social ideas of that community taken in the terms that I have outlined it to you, the average person. So you are to decide very simply, you saw the films, you know what they are, not judging them particularly by your own standards, but are they of such a nature that you believe that they offend, as charged in the statute, are obscene to the average person in this Eastern District of Kentucky. If you believe that they do and you believe that the interstate transaction has been established, the United States contends that the evidence clearly establishes that fact to the exclusion of a

reasonable doubt and that the Defendants are guilty and that you are to find them guilty. If you do not so believe, you should find them not guilty."

With regard to the third element of the test for obscenity, the jury was instructed (App. 89): ^{7/}

Obscenity is excluded from constitutional protection because it is without serious social importance. Obscene utterances are no essential part of an exposition of ideas and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that a film deals with sex does not mean that it cannot have value to society. Indeed, such a film can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific, political or artistic

^{7/} See the instruction in United States v. Hill, 500 F.2d 733 at 737 where, on similar facts and on almost an identical instruction, the Fifth Circuit said:

Although the Court first instructed the jury that the test of whether the material was obscene depended on the existence of the three elements of the Miller standard, it then went on to satisfactorily, we think, instruct the jury as to the social value element found in Roth-Memoirs.

value. It is for you to determine whether the film in issue in this case is of such value to society. If you find that it lacks serious literary, artistic, political, or scientific value, you can brand it obscene. If you find that it does have those, one or more of those adjectives that I have given you, then you should determine that it is not obscene.

The jury acquitted petitioners of the charge in Count 8 of the indictment, which involved the film preview "Let Me Count the Lays" (Tr. 939-943). The jury returned a verdict of guilty against petitioner American News on the conspiracy count. The other four petitioners were convicted on seven substantive counts and the conspiracy count (ibid.). Petitioners Marks, Mohny and Weir were sentenced to concurrent terms of 90 days' imprisonment and were fined \$16,000. Each corporate petitioner was fined \$5,000 on the conspiracy count. Petitioner American Amusement was fined \$14,000 for its substantive convictions (Tr. 944-950).

4. The Decision by the Court of Appeals.

On appeal, the Court of Appeals rejected petitioners' argument that the charge to the jury should have been based upon the standards of Roth v. United States, 354 U.S. 476, as modified by

the plurality opinion in Memoirs v. Massachusetts, 383 U.S. 413, rather than upon the standards of Miller v. California, 413 U.S. 15 (Pet. App. A11-A18). The court observed that the Roth-Memoirs test had never commanded the support of more than three Justices at one time, and that it "imposed a burden virtually impossible to discharge under our criminal standards of proof" (Pet. App. A12). The court also stated that it believed that the District Court was required to give the charge it gave "by the specific terms of the remand in Miller" (Pet. App. at A14). Finally, the court indicated that the difference between the Roth-Memoirs standards and the Miller standards was immaterial in this case because "(i)t is plain to us that the material in the present case was obscene, irrespective of which standards are applied" (Pet. App. at A12).

The Court of Appeals described the films in its opinion as follows (Pet. App. A3, fn. 1):

A composite of all of the films and film previews depict acts of cunnilingus, fellatio, onanism, sodomy, male ejaculation, sexual intercourse and group sex.

Deep Throat: portrayed a young female in quest of sexual fulfillment, which had eluded her because her clitoris was lodged in her throat. Scenes depicted males and

females engaged in cunnilingus, sodomy, group sexual encounters, where sodomy and fellatio were simultaneously practiced, sexual intercourse and male ejaculation.

Swing High: depicted a group sexual encounter where cunnilingus, fellatio, sexual intercourse, masturbation, onanism, and sodomy were practiced.

Previews

Doctor's Disciples: depicted acts of onanism, sexual intercourse, and male ejaculation.

Teenage Cowgirls: two very young females are shown in close up scenes of fellatio and sexual intercourse.

Black on White: depicted various acts of fellatio, cunnilingus and sexual intercourse by a white male with a black female and a black male with a white female.

Memoirs of a Madam: portrayed three couples on a bed in various stages of nudity engaging in oral and genital acts, and with one female masturbating with a vibrator. This preview also depicted a black male and white female engaged in sexual intercourse.

A Few Bucks More: portrayed fellatio, and male enjaculation (sic).

The Court reached its decision that the films were

unprotected by the First Amendment under either standard from the record itself and that an examination of them was not necessary for decision (Pet. App. at A19). The Court stated (Pet. App. at A5):

"... The action of the Magistrate in issuing the search warrant was supported by the affidavits of Special Agents Glossup and Selby. These affidavits clearly indicated that the films involved hard core pornography of the worst sort.

"The showing of the film was not protected by the First Amendment. It was not required that the Magistrate view the films. He could accept the sworn statements of the two Special Agents which graphically portrayed the films as well as the sound features. The Special Agents were also examined and cross-examined at the hearing."

and (Pet. App. at A14):

"There can be no question but that the material in 'Deep Throat' was hard core pornography. It was the type referred to by Mr. Justice Stewart in Jacobellis v. Ohio, 378 U.S. 184, at 197, 84 S.Ct. 1676, at 1683, 12 L.Ed.2d 793 (1964), when he stated we 'know it when (we) see it.' The jury saw it when it reviewed the film and had no difficulty

in assessing its character."

On the sufficiency of the Record, the Court of Appeals held (Pet. App. at A15):

"... In Hamling, the Court held, 418 U.S. at 108, 94 S.Ct. at 2903:

'... (W)e hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. (Citing authority) ... Our examination of the record convinces us that such a probability does not exist in this case.'

"Our examination of the record in the present appeals convinces us that such a probability does not exist here, for it is clear that under either Roth-Memoirs or Miller standards the material was obscene."

The Court of Appeals concluded that the District Court correctly had instructed the jury to apply the community standards of the judicial district where the trial was held (Pet. App. A10-A11). It held that the relevant community standards are those of the judicial district where the jurors reside, and not the standards of a nearby metropolitan area where some of the jurors may be employed.

Judge McCree dissented (Pet. App. at A18-A19) on the grounds that it is unfair to apply the Miller standards to conduct occurring prior to the date of that decision. He declined to decide whether the films are in fact protected by the First Amendment, because "to speculate on our view of the films how the jury might have decided the case if it had been given the proper instructions would deny the right of trial by jury" (Pet. App. at A19).

SUMMARY OF ARGUMENT

I

The U.S. District Court's instructions to the jury on Miller standards were proper.

The "Memoirs" standard of "utterly without redeeming social value", which was applied by Justices Brennan, Warren and Fortas in the civil "Fanny Hill" case, was never intended by those justices to be applied in the same manner in criminal cases. See the two criminal cases, Ginzburg v. U.S. and Mishkin v. New York, decided on the same day. To apply the 3 tests independently in criminal cases would be at complete odds with the requirement of those justices that the 3 tests must "coalesce".

The "Memoirs" concept of "utterly without redeeming social value", as an independent criteria, has never gained the acceptance of more

than three Justices and cannot, therefore, under our rules of judicial interpretation, attain the rank of "controlling precedent". The opinions cited by the Solicitor General involve the doctrine of the law of the case, which is a rule of practice, not a principle of substantive law.

The Solicitor General's advocacy of a new "rule of the case" which, by "prevailing" for a number of years, can command the status of "controlling precedent", is fundamentally unsound in that it contradicts well-established rules of stare decisis, and presents a means of undermining the time-honored principle that we are a nation of laws and not of men.

The words used by the Miller Court, i.e., "do not adopt" and "reject", express the connotation that the "Memoirs" standard has never been accepted by this Court.

The Miller opinion does not acknowledge that "Memoirs" was "controlling" case law. The Miller opinion was addressing itself to the attempt in the State of California to codify and legislatively apply the civil standards in "Memoirs" to the criminal field. In that process, the California State Legislature failed to incorporate the important qualifying word, "coalesce", and further prevented a rational development of that test in criminal cases.

The opinions of the Circuit Courts of Appeal show that the individual panels of judges are not in agreement as to the manner in which the so-called "Roth-Memoirs" standards function in criminal cases. For that reason, a statistical count of the Circuit Courts which have given lip service to such standards is unimportant, because it does not prove anything.

This Court's opinion in Kois v. Wisconsin, decided on June 26, 1972, was public notice to everyone that the "Roth" standards were "controlling precedent" and that the "Roth-Memoirs" standards were not controlling precedent.

Marks was indicted before the Miller decision. When Marks moved to dismiss the indictment after the Miller decision, Judge Mac Swinford was required to apply Miller and its benefits. The best way to apply its benefits is to instruct the jury on "Miller" standards.

The language of Judge Mac Swinford's instructions to the jury, read as a whole, satisfied the requirements of both the "Miller" standards and the "Roth-Memoirs" standards.

This Court's opinion in Hamling v. U.S. held the "Miller" standards to be the equivalent of the so-called "Memoirs" standards. This Court has never held that it was reversible error to give one instruction in preference to an equivalent instruction.

Petitioners' "due process" claim of a vested right, premised upon "ex post facto" principles, to have the petit jury instructed on "Memoirs" standards is constructed on two faulty premises: (1) that the federal obscenity crime requires a specific criminal intent that the defendant knew the subject matter was obscene, and (2) that a personal mistake of law is a defense to a criminal obscenity prosecution. Neither proposition is available as a foundation for a due process claim based on "ex post facto" principles.

Petitioners' "due process" claim, based upon "ex post facto" principles is without support in that: (1) there has been no judicial expansion, since both the "Miller" and "Roth-Memoirs" standards forbid the same criminal acts, (2) the judicial construction adopted in Miller was clearly foreseeable, and (3) the "Miller" standards accord the defendants the same defense as are accorded to them under "Roth-Memoirs" standards.

II

An appellate court is not required to examine the subject matter where the record is clear that a legitimate First Amendment claim has not been raised (i.e. that the films are hard-core pornography). The affidavits of Selby and Glossup clearly show the films to be hard-core pornography. That finding has not been shown to be in error.

It is intellectual nonsense to argue that, under the instant facts, the Court has not given sufficient attention to First Amendment values. See Hans Christian Anderson's "The Emperor's New Clothes" at Appendix "C" to this brief.

III

The jury was properly instructed to assess the materials in terms of the community standards of the judicial district from which the jury was selected and in which the trial was held. That concept of the "community" is the logical consequence of the declaration of national policy expressed by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C.A. section 1861.

ARGUMENT

I

The U. S. District Court's Instructions To The Jury on Miller Standards Were Proper.

A. The "Memoirs" standard of "utterly without redeeming social value" was never intended to be applied independently in criminal cases.

The "Memoirs" standard of "utterly without redeeming social value," as applied by Justices Brennan, Warren, and Fortas in the Civil Injunction "Fanny Hill" case, A Book Named "John Cleland's Memoirs of a Woman of Pleasure", et al. v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, was never intended by those justices to be applied in that same fashion in criminal cases. See the opinions in which those justices joined in the criminal cases, Ginzburg v. U. S., 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942 and Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, decided on the same date as the Fanny Hill decision, and their requirement in Fanny Hill at page 5 that the "three elements must coalesce." See also the analysis on this point appearing in the National Decency Reporter of June-July 1966, a copy of which is attached as Appendix B to the Brief Amicus Curiae herein.

The requirement voiced in the opinion of Justices Brennan, Warren, and Fortas in "Memoirs" at page 6 that:

"A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently"

(Our emphasis.)

is not so startling when one considers that this Court in Fanny Hill was reviewing an injunctive-type decree rather than a criminal conviction.^{1/}

It does not follow, however, that the criteria are applied independently in criminal cases, nor does it mean that where there is a proper finding in a criminal case that the dominant appeal is to prurient interest, the subject matter may still have redeeming social importance under the circumstances at issue. In a criminal case, a finding that the dominant theme--prurient interest test--has been met would necessarily be inconsistent with a finding of redeeming social importance.

^{1/} Justice Brennan drew attention to this distinction at Footnote 3 of his opinion in the Fanny Hill case. See also Footnote 15 of Justice Brennan's opinion in the Ginzburg case.

In the review of an injunction, the United States Supreme Court is confronted by a decree forbidding all distributions and encompassing a myriad of fact situations. In contrast, a criminal conviction embraces one given set of facts. The broad scope of the inquiry in an injunction situation requires that the test be applied independently, so that all factual situations are considered.

For example, assuming slight historical value, as hypothesized by the Massachusetts Supreme Court--what of the possible distribution to literateurs who might wish to study Fanny Hill for its historical significance in the development of the English novel, or the sociologists, who might have occasion to refer to it in their studies, or attorneys who might study it in connection with their efforts to arrest the spread of pornography?

The Massachusetts Statutes under consideration by the High Court, both criminal and civil, allowed no specific exemptions or defenses for situations which did not involve "pandering." Compare in this regard, the American Law Institute recommendations contained in Section 207.10 (4) (c) of the Model Penal Code (1957 draft) which provides:

"The following shall not be criminal

offenses under this section . . . (c) Dissemination to institutions or individuals having scientific or other special justification for possessing such material"

Moreover, the Massachusetts statutory procedure authorized "collateral uses" of the injunctive decree, which further gave the impression of inhibiting legitimate use of the book. Footnote 4 of the opinion of Justices Brennan, Warren, and Fortas noted that Section 28H of the Massachusetts Injunctive Statute made a decree that a book was obscene "admissible in evidence" in a criminal prosecution under Section 28B and provided that "if prior to such offense a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be 'conclusively presumed to have known' the book to be obscene." Justice Brennan's opinion noted at Footnote 5 that such "collateral uses of the declaration" would have a "serious inhibiting effect on the distribution (legitimate) of the book. . . ."

Under a strict interpretation of the Massachusetts Statutes, the distribution noted above (to literateurs, sociologists, etc.,) would have been barred by the Massachusetts decree.^{2/} To draw

^{2/} The "conclusive presumption" position of the Massachusetts Injunctive Statute is criticized by the drafters of the Model Penal Code. See the reporter's comments in the 1957 draft at page 51.

in focus the constitutional issue underscored by the opinions of Justices Brennan, Warren, and Fortas, one need only to compare in contrast the results which should follow in the criminal forum, were the same factual situations to exist. Such distributions are not a violation of the obscenity laws. There is absent the pandering aspect. The predominant appeal of the material is not to prurient interest, but is rather to a legitimate social purpose which has social value. Accordingly, the Court would be required to rule that, as a matter of law, there was redeeming social importance and no jury question was presented.

In our view, the opinion of Justices Brennan, Warren, and Fortas would have been more precise had it expressed the obvious--that the theory of "independent" tests, relating as it does to variable obscenity concepts, has limited application to the injunctive-type proceeding and is not to be carried over and applied carte blanche in criminal areas. To be consistent, those three justices would have to agree that in a criminal case the "dominant theme--prurient appeal" test and "social value" test coincide ("coalesce"), so that in the criminal forum there is but one, and not several independent tests.

In criminal cases, it is at complete odds with the "variable" concept expressed by the

majority opinion in Mishkin and Ginzburg to say either that the "utterly without redeeming social value" phrase is an independent test, or that it is a necessary part of the definition of "obscene." If the dominant appeal of the material is aimed at prurient interest as defined in the Model Penal Code, then the conduct is in the area of criminal activity and the subject matter is utterly without redeeming social importance under the circumstances. In criminal cases, unlike the situation which exists in injunction cases, a specific set of facts are in issue and the two tests "coalesce." See Pierce v. Alabama, 296 So. 2d 218, 222 (May 9, 1974) cert. denied in Pierce v. Alabama, ___ U.S. ___, 42 L.Ed.2d 830, ___ S.Ct. ___ (Jan. 20, 1975) where the Alabama Supreme Court said:

"Thus any portion of McKinney I (Roth-Memoirs) in conflict with Miller are expressly overruled. Coalescence of the three-pronged Miller test must now be demonstrated before a conviction may be had in an obscenity case." (Our emphasis.)

In reviewing the book Housewife's Handbook on Selective Promiscuity, the majority in Ginzburg did not apply the social value test independently, but rather considered the dominant appeal of the material in the light of the precise

facts being reviewed (coalescence).^{3/}

B. The "Memoirs" concept of "utterly without redeeming social value" has never attained the rank of "controlling precedent."

The "Memoirs" concept of "utterly without redeeming social value" as an independent criteria, could not, under our system of jurisprudence, attain the rank of "controlling precedent." See U.S. v. Pink, 315 U.S. 203, 216; Cain v. Commonwealth of Kentucky, 437 S.W.2d 76 (Feb. 14, 1969); Florida v. Reese, 222 So.2d 732 (May 21, 1969); the concurring opinion of Justice Barnes of the Maryland Court of Appeal in Wagonheim v. Maryland State Board of Censors, 258 A.2d 240 at 247, 252 (Oct. 22, 1969); and the dissenting opinion of Associate Justice Musmanno in Commonwealth of Pennsylvania v. Robin, 421 Pa. 70, at 94-96, 218 A.2d 546 (Mar. 22, 1966) in which Justice Musmanno stated, at page 94:

"Under our system of case law a decision becomes a precedent for controlling other cases when the opinion of the Court, accepted by a majority of the judges, announces a definite principle of law. If the decision commands no majority projection of law it is

^{3/}In Ginzburg, the Court said at page 39:

". . . we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence. . . ." (Our emphasis.)

rated as a 'no-clear majority' decision which is binding only for its journal result. All that the Gerstein case really decides is that the decision of the Supreme Court of Florida which banned 'Cancer' in Florida was reversed. Only speculation can guess as to what was really wrong with the Florida decision because, I repeat, there was no opinion filed by the Supreme Court. It, therefore, follows, if we have any rule of judicial interpretation in America, that Gerstein is no authority for what may or may not be done with 'Cancer' in Pennsylvania.

"Eugene Wambaugh, who was a Professor of Law at Harvard University, wrote in his book, *The Study of Cases*, that 'Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially.'

"He cites in this connection the case of Dubuque v. Ill. R. R. Co., 39 Iowa 56, 80: 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court be equally divided or less than a

majority concur in a rule, no one will claim that it has the force of the authority of the court.'

"Henry Campbell Black, in his treatise on *Law of Judicial Precedents*, says: 'If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result.'"

The above analyses were, in substance, confirmed by this Court's opinion in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 438, 90 S.Ct. 207 (June 21, 1973) where this Court said at page 431:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, 33 L.Ed.2d 312, quoting Roth v. United States, supra, at 489, 1 L.Ed.2d 1498; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs v. Massachusetts, 383 U.S., at 419, 16 L.Ed.2d 1; that concept has never commanded the adherence of more than three Justices at one time.^{7/}"

Footnote 7 to the statement of law in Miller reads:

"A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication. . . ." Kois v. Wisconsin, 408 U.S. 229, 231, 33 L.Ed.2d 312, 92 S.Ct. 2245 (1972). See Memoirs v. Mass., 383 U.S. 413, 461 16 L.Ed.2d 1, 86 S.Ct. 975 (1966) (White, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of "social importance." See id., at 462, 16 L.Ed.2d 1 (White, J., dissenting.)"

The recent individual opinions of members of this Court in Gregg v. Georgia, 428 U.S. ___, 49 L.Ed.2d 859, 96 S.Ct. ___ (July 2, 1976), Roberts v. Louisiana, 428 U.S. ___, 49 L.Ed.2d 974, 96 S.Ct. ___ (July 2, 1976), and Green v. Oklahoma, 428 U.S. ___, 49 L.Ed.2d 1214, 96 S.Ct. ___ (July 6, 1976), cited by the Solicitor General, are inapposite on the question presented herein, which concerns "controlling precedent." The doctrine of the law of the case is a rule of practice and not a principle of substantive law,^{4/} much less Constitutional law. It was never intended to

^{4/} 21 C.J.S. Courts § 195 at page 330. See also, Supreme Court No-Clear-Majority Decisions, A Study in Stare Decisis, 24 U. of Chi. L. Rev. (1956) at pages 99-156, for a discussion of this problem.

change the law regarding "controlling precedent," or permit a minority opinion of U. S. Supreme Court Justices to change the law in 50 states. See Musmanno, dissenting in Commonwealth of Pennsylvania v. Robin, supra, at pages 93-94.

C. The Solicitor General's Advocacy of a new "rule of the case" which, by "prevailing" for a number of years, can command the status of "controlling precedent" is fundamentally unsound.

The Solicitor General's advocacy (at page 29 of his Brief on the Merits) of a new principle of law—a "rule of the case" which, by "prevailing" for a number of years, can command the status of "controlling precedent" is fundamentally unsound in that it:

- (1) contradicts well-established rules of stare decisis, and
- (2) presents a means of undermining the time-honored principle that we are a nation of laws and not of men.

To apply the Solicitor General's Rule would permit men in positions of ultimate authority to make new law by refusing to follow the existing law. ^{5/}

^{5/} A classic example of this problem is present in the history of the struggle to control the growth of pornography during the 20-year period, 1956-1976. Justices Black and Douglas dogmatically (This footnote is continued on the next page)

D. The Solicitor General's Claim of prior acceptance of the "Memoirs" standard as a "rule" is not supported by the language used by the Miller Court, which stated that it "rejected", (not discarded) that ambiguous concept.

The Solicitor General is in error when he argues, as support for his proposition that the Memoirs standard had prior acceptance as a "rule", that the Miller Court "discarded . . . the Memoirs standard" (see Brief for the United States at page 30). What this Court really said in refused to follow the law as laid down by the majority in 1957 in Roth-Alberts. As a result, the people's cause has been unjustly saddled with an infirmity which required them to win over 5 of the remaining 7 Justices every time a case is docketed with the Court. On the reasonableness of the Douglas view, the late Justice Harlan had the following comment to make in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, at 705, 20 L.Ed.2d 225, 244, 88 S.Ct. 1298, 1314:

"Two members of the Court steadfastly maintained that the First and Fourteenth Amendments render society powerless to protect itself against the dissemination of even the filthiest materials. No other member of the Court, past or present, has ever stated his acceptance of that point of view. . . ."

Because of this Court's failure to require those Justices to adhere to "controlling precedent", lewd films like "Deep Throat" are now commonplace in America and have been exported to the world at large--to our great shame, and to the discredit of our judicial system in America.

Miller v. California, supra, at page 431, was:

"We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts. . . ." (our emphasis).

and at footnote 7 on page 431:

". . . We also reject, as a constitutional standard, the ambiguous concept of 'social importance'" (our emphasis).

The use of the word "adopt" expresses the connotation that a prior relationship had never existed. Webster's Collegiate Dictionary, Fifth Edition, defines the verb "adopt" as:

- "1. To take by choice into some relationship, such as that of heir, friend, citizen, etc; to take voluntarily (a child of other parents) as one's own child.
2. To take and apply or put into practice as one's own (what is not so naturally).
3. Parl. Practice. To accept, as a report, in acquittance of a duty imposed."

The verb "reject" which was used by the Miller Court at footnote 7 expresses an implication that the "Memoirs" concept had never ever been "used" by the Court. Webster's Collegiate Dictionary, Fifth Edition, explains the difference between the verb "discard", used by the Solicitor General, and "reject", as used by the Miller

Court as follows:

"To discard is to put or throw aside or away, especially as useless or outworn; as, discarded clothing; to reject is more commonly to repel, or refuse to receive or to employ, something offered; as, to reject an offer."

E. The Miller opinion does not recognize that the constitutional test of obscenity had been changed. Miller did not review federal "Memoirs Standards" as such, but rather a California Statute which had attempted to codify and legislatively apply the ambiguous "Memoirs" concept.

The Solicitor General is in error when he states that this Court, in Miller, recognized that the constitutional test of obscenity had been changed.^{6/} In Miller v. California this Court was not reviewing a case which involved the

^{6/} See Brief for the United States at page 30:

"The Court has recognized that Miller changed the constitutional test of obscenity. In Miller itself the trial had taken place after Memoirs, and the jury had been charged under the Roth-Memoirs standards. The Court indicated that this was proper, because the Memoirs test was correctly regarded at the time of trial as limiting state prosecution under controlling case law (413 U.S. at 30-31). The Miller Court explicitly formulated new rules to alleviate the almost impossible burden of proof ..."

federal "Memoirs" standards as used by Justices Fortas, Brennan and Warren in the Fanny Hill, Ginzburg, and Mishkin cases, but instead, was reviewing a conviction based upon section 311(a) of the California Penal Code, a state statute which had attempted to codify and legislatively apply the civil standards in "Memoirs" to the criminal field.^{7/} In the process, the California State Legislature failed to incorporate the important qualifying word "coalesce", and thereby further complicated a test which, as utilized in the civil injunction "Fanny Hill" case, involved a subtle distinction, and called for a clear understanding of a complex development in the law. See "Analysis of the Mishkin, Ginzburg and Fanny Hill Cases" at Appendix B to the Brief Amicus Curiae, annexed hereto. When this Court said in Miller at page 435:

"This (Memoirs standard)...was correctly regarded at the trial as limiting state prosecution under the controlling case law." it had reference to the fact that California,

^{7/} See Miller at page 430:

"The case we now review was tried on the theory that the California Penal Code §311 approximately incorporates the three-stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author; and no Member of the Court today supports the Memoirs formulation."

not the United States Supreme Court, had adopted "Memoirs" as the rule of law for the State of California.^{8/}

F. Statistics relating to the number of Circuit Courts which have given lip service to "Roth-Memoirs" standards are immaterial. The inherent ambiguity of "Roth-Memoirs" standards has prevented those same courts from being in agreement as to the manner in which they function in criminal cases.

The importance that the Solicitor General attaches to his statement at page 30:

"Every court of appeals that considered the matter between Memoirs and Miller held, on similar reasoning, that the charge to the jury must be based on the Roth-Memoirs standards."

is not warranted. Those Courts were never in agreement as to the manner in which the "Roth-Memoirs" standards functioned in criminal cases, as applied to given subject manner.

^{8/}See Miller at page 435:

"As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of Memoirs. This, a 'national' standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case law."

The "Fanny Hill" civil injunction opinion requires that "the three elements (of the Memoirs test) must coalesce." See Point I A, supra, at page 21 and the preceding Motion at page 6, footnote 4. The word "coalesce", which is defined in Webster's Collegiate Dictionary as "To grow together into one body" and "to combine into one body or community; as vapors or parties coalesce", precludes an overemphasis on the "utterly without redeeming social value" standard. Viewed in this light, the "Miller" standards are equivalent to the "Roth-Memoirs" standards, as this Court held in Hamling v. U.S., and do not represent a "marked shift in the scope of the material deemed to be obscene" or "expanded the field of potential criminal liability" or prevent the petitioners from knowing "the standard by which his conduct will be judged", as erroneously construed by the Court of Appeals in U.S. v. Wasserman, 504 F.2d 1012, 1015 (5th Cir., Dec. 9, 1974) and U.S. v. Jacobs, 513 F.2d 564, 566 (9th Cir., Sept. 25, 1974).

In those Circuit Courts (D.C., 1st, 5th and 9th) which are cited by the Solicitor General as support for his proposition that a jury charge in "Roth-Memoirs" standards was mandated under the trial facts herein, several appellate panels have reached that conclusion through a misunder-

standing as to the manner in which the "Roth-Memoirs" standards were meant to be applied. See the test used by the Court of Appeals, District of Columbia Circuit, in U.S. v. Sherpix, Inc., 512 F.2d 1361 (May 15, 1975) at page 1365 which omits a consideration of the word "coalesce" from the "Memoirs" definition. Compare, however, the result reached by the Court of Appeals in U.S. v. Hill, 500 F.2d 733, 737 (Sept. 11, 1974), where an entirely different view of the "Roth-Memoirs" standard was employed by that 5th Circuit panel. The Hill Court, in applying the "Roth-Memoirs" standard, found the trial court's instructions to the jury to be correct, even though that Court did not "mouth" the "Roth-Memoirs" standard, at page 737:

"Although the Court did not use the words 'utterly without redeeming social value' as expressed in Memoirs, we do not deem it necessary that a jury instruction recite the precise words of judicial opinions in order to convey the ideas therein expressed. Defendant would have us hold that the law is revealed to the jury by some magical incantation of the exact words of a legal opinion, and anything short of that is reversible error. We think the above passage of the Court's charge, read

with the instructions as a whole, was sufficient to inform the jury that they should not convict the defendant if they found the materials to be of any social value."

It is quite obvious that the District of Columbia Circuit panel sitting in U.S. v. Sherpix, supra, (MacKinnon, Moore and Robb) did not have the same view of the "Roth-Memoirs" standard as the 5th Circuit panel sitting in U.S. v. Hill, supra, (Roney, Moore, Ainsworth). In this regard, see the discussion of U.S. v. Hill, supra, which appears in U.S. v. Sherpix, 512 F.2d 1361 at 1366.

An analysis and comparison of the above opinions in Sherpix and Hill demonstrates that the "clear consensus of the courts that have considered the question" which the Solicitor General mistakenly relies upon (See Brief for the United States at page 17) is not so "clear" - at least as to the basic understanding of what the "Roth-Memoirs" standard requires.

G. That the "Roth" standard remained as "controlling precedent" was publicly announced by this Court's "clear majority decision" on June 26, 1972, in Kois v. Wisconsin.

If there was ever any doubt that the "Roth" standard was "controlling precedent" for the trial court below, that doubt was dispelled by this Court's clear majority decision in Kois

v. Wisconsin, 408 U.S. 229, 33 L.Ed.2d 312, 92 S. Ct. 2245 (June 26, 1972). The rejection of this proposition by the Solicitor General (Brief for the United States at page 32, footnote 16) does not mention the fact that 7 judges of a 15 judge en banc panel of the Court of Appeals (Fifth Circuit) in U.S. v. Groner, 479 F.2d 577 (May 22, 1973) were of the opinion that Kois did broadcast that legal principle. Except for the fact that the 8th judge, Circuit Judge Clark in the en banc hearing in U.S. v. Groner, supra, had some reservation on the significance of Kois v. Wisconsin (see his concurring opinion at page 588), such would have become controlling law in the 5th circuit, and would have turned the "consensus", relied upon by the Solicitor General, in the direction of a 3-3 split. See Point I F, supra, at pages 36-39.)

H. Because the federal indictments were returned before Miller was decided, this Court's decision in Hamling v. U.S. controls, and the trial judge was required to instruct the jury on Miller Standards.

To the extent that the grand jury indictments against the petitioners were filed on April 27, 1973, some two months before the decision in Miller v. California, the general principles expressed in Hamling v. U.S., at 611:

"a general change in the law occurring after a relevant event in a case will be given effect while the case is on direct review."

and:

"any constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case."

are arguably apposite. Assuming that the above propositions of law do apply and govern pre-trial motions after indictment, Judge Mac Swinford's decision on Oct. 5, 1973 to overrule the Petitioners' pre-trial motion to dismiss (App. A47-A52), and to instruct the jury on the "Miller" standards in the jury trial which was conducted immediately thereafter, fully complies with the principles expressed in Hamling. The surest way to "apply" any benefits which may arise out of "Miller" standards is by instructing the jury on "Miller" standards.

I. Judge Mac Swinford's instructions to the jury were sufficient under both the "Miller" standards and the "Roth-Memoirs" standards.

In U.S. v. Hill, 500 F.2d 733 (5th Cir., Sept. 11, 1974) cert. denied in Hill v. U.S., ___ U.S. ___ 43 L.Ed.2d 430, ___ S.Ct. ___ (Feb. 24, 1975), Circuit Judge Roney, speaking for the unanimous 5th Circuit panel, held as follows,

as to the instructions therein given by the trial judge, at page 737:

"Assuming without deciding that something other than the varying semantics of different words to articulate the same idea is involved in the Miller decision and that it does articulate a standard different than Roth by which a jury could reach different conclusions on the material involved in this case, an examination on the charge to the jury reveals that the defendant was given the benefit of both standards. Although the Court first instructed the jury that the test of whether the material was obscene depended on the existence of the three elements of the Miller standard, it then went on to satisfactorily, we think, instruct the jury as to the social value element found in Roth-Memoirs. The Court said:

'Freedom of expression is fundamental to our society and has contributed much to the development and well-being of our free society. In the exercise of the constitutional right to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed, freely

and publicly, so long as the expression does not fall within the area of obscenity. However, the constitutional right to free expression does not extend to the expression of that which is obscene.

Furthermore, obscenity is excluded from constitutional protection because it is without social value. Of course, the mere fact that material deals with sex does not mean that it cannot have value to society. Indeed, such material can have social importance if it portrays sex in a manner that advocates ideas or that has literary, scientific or artistic value. It is for you to determine whether the materials at issue in this case are of value to society.'

Although the Court did not use the words 'utterly without redeeming social value' as expressed in Memoirs, we do not deem it necessary that a jury instruction recite the precise words of judicial opinions in order to convey the ideas therein expressed. Defendant would have us hold that the law is revealed to the jury by some magical incantation of the exact words

of a legal opinion, and anything short of that is reversible error. We think the above passage of the Court's charge, read with the instructions as a whole, was sufficient to inform the jury that they should not convict the defendant if they found the materials to be of any social value.

The precise effect of the Court's instructions to the jury in the instant case was to secure for the defendant the same protection at trial as to the facts which a Thevis review by this Court affords him on appeal as a constitutional matter. By charging the jury under both the Miller and the Roth-Memoirs tests of obscenity, the District Court gave the defendant the benefit of both standards. (Our emphasis).

That portion of Judge Mac Swinford's instruction which is reproduced at page 14 of this brief (see App. A89 at first full paragraph) beginning with the sentence "Obscenity is excluded from constitutional protection because it is without serious social importance" is, word for word, the same as the second of the two paragraphs of the trial court instruction in Hill, which was relied upon by the Fifth Circuit, as support for its affirmation.

J. This Court's holding in Roth-Alberts that it was not error to give an equivalent instruction for the definition of "obscene" mandates a determination that Judge Mac Swinford's instructions were proper.

The majority opinion in Roth-Alberts, 354 U.S. 476, 1 L.Ed.2d 1498, 76 S.Ct. 1314 (June 24, 1957) approved four definitions for the word "obscene" as being substantial equivalents. At page 486, the federal court sponsored test in Roth and the state court sponsored test in Alberts were set forth:

"In Roth, the trial judge instructed the jury: 'The words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts.' (Emphasis added.) In Alberts, the trial judge applied the test laid down in People v. Wepplo, 78 Cal.App.2d Supp. 959, 178 P.2d 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires.'"

The court thereafter held both tests to be within the constitutional standard, when given with proper jury instructions relevant to the dominant

theme and proper audience.

At page 489, Justice Brennan gave tacid approval to a third definition in these words:

"Some American courts adopted this standard but later decisions have rejected it and substituted this test: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press..."

At page 487, footnote 20, the majority opinion gave approval to the definition found in the A.L.I. Model Penal Code, Section 207.10(2) (Tentative Draft 1957) and noted no significant difference between this and the meaning of obscenity developed in the case law:

"...A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or

representation of such matters.... See Comment, id., at 10, and the discussion at page 29 et seq."

Nowhere, either in the judgment entered in Roth v. U.S. or in Alberts v. California, or in any case subsequent thereto, has this Court ever held that it was reversible error to give one instruction in preference to an equivalent instruction. See Hamling v. U.S., supra, at pp. 617-619. Accordingly, Trial Judge Mac Swinford's instruction to the jury on the "Miller" standard, which in Hamling v. U.S., supra, at page 620 was held to be equivalent to the so-called "Memoirs" standards, was entirely proper. See also U.S. v. Hill, supra, at Point 1-I, at page 41, supra.

K. Petitioners' "due process" claim of a vested right, premised upon "ex post facto" principles, to have the petit jury instructed on "Memoirs" standards, is constructed on faulty premises.

Petitioners' "due process" claim of a vested right to have the petit jury instructed on "Memoirs" standards is devoid of merit, having been constructed upon two faulty premises; namely, (1) that the federal obscenity crime requires a specific criminal intent that the defendant knew the subject matter was obscene, and (2) that an erroneous personal mistake of law is a defense

to a federal obscenity charge. Neither proposition is available as support for their claim. Under Rosen v. U.S., 161 U.S. 29, 40 L.Ed. 606, 16 S. Ct. 434 (1896) and Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 622, 94 S.Ct. 2887 (June 24, 1976) the federal obscenity statute required only a general criminal intent. Further, the petitioners' personal belief is irrelevant, Schindler v. U.S., 208 F.2d 289, 290 (9th Cir. 1953) cert. denied in Schindler v. U.S., 347 U.S. 938, 98 L.Ed. 1088, 74 S.Ct. 633 (1954); Miller v. U.S., 431 F.2d 655, 659 (Sept. 16, 1970), vacated and remanded in Miller v. U.S., 413 U.S. 913, 37 L. Ed.2d 1022, 93 S.Ct. 3030 (June 25, 1973), reaffirmed and original opinion adopted, in Miller v. U.S., 507 F.2d 1100 (Nov. 29, 1974), cert. denied in Miller v. U.S., 422 U.S. 1025, 45 L.Ed. 2d 683, 95 S.Ct. 2620 (June 16, 1975).

Although the above argument was considered and rejected in U.S. v. Jacobs, 513 F.2d 564, 566 at footnote 2 (9th Cir., Sept. 25, 1974), the rationale of that Court is not sound. In the first place, the Court failed to recognize that Jacobs had previously been put on notice in Kois v. Wisconsin, supra, that he had no right to rely upon "Memoirs" standards. (See Point I G, at page 39, supra).

Further, in rejecting the above argument,

the Jacobs Court supported its conclusion with the following rationale:

"The argument is spurious. The pre-Miller definition of obscenity involved a somewhat vague (although not so obscure as to violate due process) series of value judgments, left to the jury for final determination. The Miller definition embodies a different series of value judgments, which at least in the third prong gives the jury a broader task, hence making the statute's proscriptions more uncertain (although again not so vague as to violate due process, see Hamling, supra, at 110-116, 94 S.Ct. at 2904-2907, 41 L.Ed.2d at 616-620)..."

Notwithstanding the fact that the Jacobs Court recognized that the premise upon which they grounded their conclusion did not constitute a due process violation under this Court's recent decisions (see above "although not so obscure as to violate due process" and "although again not so vague as to violate due process..."), that Court, nevertheless, was able to construct upon those same faulty foundations, a "due process" right of an individual "to take his best guess as to what the jury may ultimately (factually) decide." Amicus submits that the "best guess" right of an individual in those circum-

stances is no broader than that noted by this Court in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, at page 433, footnote 10, and in Nash v. U.S., 229 U.S. 373 (57 L.Ed.2d 1232, 33 S.Ct. 780), cited at footnote 10. The Jacobs rationale flies in the face of Rosen, supra, and Nash, supra. Rosen was, in short, a public policy statement that when one deliberately enters the distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. If it be thought that this puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in Nash v. U.S., 229 U.S. 373, 377, cited in Tyomies Publishing Co. v. U.S., 211 Fed. 385:

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death...."

L. Petitioner has failed to state a valid "due process" claim based upon "ex post facto" principles.

Assuming the law to be as suggested by the

Solicitor General that the Due Process Clause absorbs ex post facto principles and/or applies precisely the same limitations to judicial construction, still the due process claim must fail for failure to state a case within the perimeters of Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d, 894, 84 S.Ct. 1697 (June 22, 1964).

As was stated by the Solicitor General (Brief for the United States, at pages 18 and 19), the understanding of the meaning of the Ex Post Facto Clause has not changed significantly since Mr. Justice Chase announced for a unanimous Court in Calder v. Bull, 3 Dall. 385, 390, that a law is an ex post facto law if it makes criminal, acts which were not forbidden when they occurred; if it increases the punishment for criminal acts; or if it "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Also, a law is an ex post facto law if "in (its) relation to the offense, or its consequences (it) alters the situation of a party to his disadvantage" or "takes away or impairs the defense which the law has provided the defendant" at the time of the offense. Kring v. Missouri, 107 U.S. 221, 228-229 (quoting from United States v. Hall, 26 Fed. Cas. 84, 86-87 (No.

15,285)).

Amicus submits that the Solicitor General is in error in concluding that the action taken by the trial court breached the above "ex post facto" principles, for the following reasons:

1. There has been no judicial expansion. The "Memoirs" standards, properly construed, and the "Miller" standards forbid the same criminal acts. See Points I A through I J, at pages 21-47, supra.
2. The judicial construction adopted by the majority in "Miller" was foreseeable and a reasonable person would not have been caught unawares. See Point I A through I J, at pages 21-47, supra. Note, in particular Point I G, at pages 39-40. See also Bradley v. Richmond School Board, 416 U.S. 696, 40 L.Ed.2d 476, 94 S.Ct. 2006 (May 15, 1974) at 493, where this Court held:

"From the outset, upon the filing of the original complaint in 1961, the Board engaged in a conscious course of conduct with the knowledge that, under different theories, discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees. Even assuming a

degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under §718, if known, rather than simply the common-law availability of an award, would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

3. The "Miller" standards did not "take away or impair the defense which the law has provided the defendant." That defense which was formerly available under the previous constitutional standards is still available under "Miller" standards.

The Solicitor General's claim (Brief for the United States at page 19) that the Government's burden of proof has been "eased" by Miller v. California is groundless. In a case such as this, where obscenity per se is at issue, the proof is established by the subject matter itself, and the government's burden of proof has never been greater than that of offering the subject matter in evidence. That burden has not been "eased" by "Miller". That the government's case-in-chief herein presented fully met their burden of proof

is clear beyond doubt, and the correctness of that proposition of law does not depend upon any subsequent rule of law laid down in Miller, supra. See Paris Adult Theater I v. Slayton, 413 U.S. at 56, 37 L.Ed.2d at 456, 93 S.Ct. at 2634, Kaplan v. California, 413 U.S. at 120, 37 L.Ed.2d at 488, 93 S.Ct. at 2684 and U.S. v. Thevis, 484 F.2d 1149 at 1153.

II

An Appellate Court Is Not Required To Examine The Subject Matter Where The Record Is Clear That A Legitimate First Amendment Issue Has Not Been Raised (i.e. That The Films Which Were Exhibited To The Jury Are Obscene Per Se).

Amicus Curiae disagrees with the position taken by the Solicitor General on Question 2, which is phrased in the Petition for a Writ of Certiorari as:

"2. Whether an appellate court, in performing its duty enunciated in Jacobellis v. Ohio, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?"

and contends that the Court of Appeals was correct in its findings that the record, described here-

inafter, is sufficient, and that there was no need for the Court to examine the films:

- (1) Affidavit of Special Agent Ronald F. Selby setting forth the contents of the film "Swing High" and previews of "Doctor's Disciples". (See Statement of Facts" at page 6, supra, and App. at pages 11-13).
- (2) Affidavit of Special Agent Vernon R. Glossup, setting forth the contents of the film "Deep Throat" and the previews "Teenage Cowgirls", "Black on White", "A Few Bucks More", and "Memoirs of a Madam". (See "Statement of Facts" at pages 5 and 6, supra, and App. at pages 16-26);
- (3) The Court of Appeals' description of the films in its opinion. (See "Statement of Facts" at pages 16 and 17, supra, and Pet. App. A3, fn 1);
- (4) The opinion of the Court of Appeals, holding:
"These affidavits clearly indicated that the films involved hard-core pornography of the worst sort", (See "Statement of Facts" at page 18 and Pet. App. at A5):
"There can be no question but that

the material in 'Deep Throat' was hardcore pornography. (See "Statement of Facts" at page 18, and Pet. App. at A14); and "Our examination of the record in the present appeals convinces us that such a probability does not exist here, for it is clear that under either Roth-Memoirs or Miller standards the material was obscene. . . ." (See "Statement of Facts" at page 19, and Pet. App. at A15).

Amicus submits that it is intellectual nonsense to suggest that, given the record herein, the Court of Appeals' position "reflected insufficient attention to the First Amendment values involved." (Brief for the United States at page 35 footnote 20). Its finding that the films were "the type referred to by Mr. Justice Stewart in Jacobellis v. Ohio . . . when he stated we 'know it when (we) see it'" symbolizes the common sense judgment immortalized by Hans Christian Anderson in his fable "The Emperor's New Clothes".^{9/}

^{9/}See a reproduction of "The Emperor's New Clothes", printed in Denmark by Fyens Stiftsbogtrykkeri, Odense at Appendix "C". While a "fairy tale" is not a common reference in legal briefs, more and more Courts are seeing the need to rely upon this classic. See Ohio ex rel. Ewing v. "Without A Stitch", 276 N.E.2d 655, 658 (July 9, 1971). It has been well observed that a First Amendment question is not raised, nor a First Amendment value involved, every time that a piece of toilet paper is offered for viewing in the Courtroom.

III

The Jury Was Properly Instructed To Assess The Materials In Terms of The Community Standards Of The Judicial District From Which The Jury Was Selected And In Which The Trial Was Held.

Amicus Curiae agrees with the Solicitor General's position on Question 3 that the jury was properly instructed to apply the contemporary community standards of the judicial district in which the trial took place. The most logical reason for applying that rule is the rationale applied by seven justices of the Court of Appeals, Fifth Circuit, sitting en banc in U.S. v. Groner, 479 F.2d 577 (May 22, 1973) at page 583:

"Our concept of the community is suggested by the declaration of our national policy in the Jury Selection and Service Act of 1968, 28 U.S.C.A. section 1861 (Sup. 1972) from which we quote:

'It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district

or division wherein the court convenes.'" "

(Emphasis theirs.)

Further, as stated by this Court in Hamling v. U.S., 418 U.S. 87, 107, 41 L.Ed.2d 590, 614, 94 S.Ct. 2887:

"a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group..."

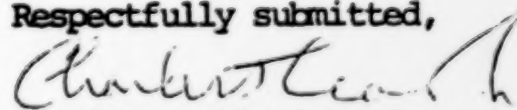
Judge Mac Swinford's jury instruction on the "average person" and comprehensive general instructions on the "contemporary community standards", repeated herein at pages 10 through 14, supra, (App. 85, 88, 94) amply complied with that requirement.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

DATED: September 17, 1976

Respectfully submitted,


Charles H. Keating, Jr.
919 Provident Tower
Cincinnati, Ohio

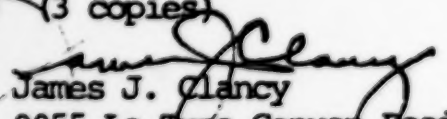
James J. Clancy
9055 La Tuna Canyon Road
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Counsel for Citizens for
Decency Through Law, Inc.

CERTIFICATE OF SERVICE

I, hereby certify that on this 18th day of September, 1976, copies of the within Motion of Citizens for Decency Through Law, Inc., For Leave To File a Brief as Amicus Curiae in Support of the Respondent United States of America; and Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent United States of America were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Mr. Robert Eugene Smith, Esquire
2005 One Hundred Colony Square
Atlanta, Georgia 30361 (3 copies)

Mr. Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530 (3 copies)


James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California.

Counsel for Citizens for
Decency Through Law, Inc.

APPENDIX A

VARIETY news articles, reporting on the action (Concession) of the Solicitor General in his Brief for the United States, filed on or about July 9, 1976.

DAILY VARIETY, dated July 14, 1976. A-1

WEEKLY VARIETY, dated July 21, 1976 A-2

WEEKLY VARIETY, dated July 28, 1976 A-3

Reference: See Motion for Leave To File Brief Amicus Curiae at page 4, footnote 3.

Washington Likened To Corrupt French Court By Memphis U.S. Atty.

By MATTY BRESCIA

Memphis, July 13 — Understandably, the Dept. of Justice's charitable view toward "Deep Throat" expressed in this week's Supreme Court filings does not sit well with the federal prosecutors who convicted its producers, cast and distributors in April.

Openly challenging the Solicitor General's viewpoint, U.S. attorney Thomas F. Turley likened Washington to the royal court described by Voltaire: "Remote, corrupt, unteachable and unconcerned." Turley added it is "unusual for me to criticize my superior in Washington so colorfully, but that's the way I feel."

Apprised of Turley's comment, a department spokesman in Washington exclaimed, "My God, Turley didn't say that. Oh, Lord," adding, "No, I won't give you my name. Please don't quote me — I don't want anyone to know that I know about this or talked to anyone in Memphis."

Turley and fellow prosecutor Larry Parrish apparently fear their controversial conviction of "Throat" could be undone by the pleading of Solicitor General Robert Bork in an unrelated case involving an exhibitor of the pic in Newport, Ky. Bork argued the exhib was entitled to a new trial to acknowledge that stiffer Supreme Court obscenity standards were not in effect when "Throat" was first made.

Prosecutors here fear Bork has "confessed the error" of their recent victory and that conviction, plus other Memphis cases involving "School Girl" and other films, "could be washed out."

Porno Defense Lawyers Joyous, Some Rap Angry Prosecutor Turley

Memphis, July 20.

Consternation of U.S. Attorney Thomas F. Turley Jr. and apparently most of his colleagues in the Federal prosecution office here upon learning recently that Solicitor General Robert Bork of the Dept. of Justice in Washington had "undone" the convictions victory against "Deep Throat" and opened the way to new trials was reported last issue.

Since then the various defense attorneys have sounded off against Turley for his "intemperate" language in comment upon Bork. Plainly the pro-porno forces are delighted by Bork's action and consequently disapproving of the Memphis prosecutor "rage." Latter sees months of work and perhaps \$4,000,000 in prosecutorial costs lost and the possibility of a great victory for the pornographers' interest.

Philip Edward Kuhn, who defended Anthony Battista, a Philadelphia film distributor in the "Deep Throat" obscenity trial, chided Turley for chiding his (Turley's) superior in Washington.

Kuhn argues that all the defenders of the fellatio film's accused corporations and persons had

asked the Memphis trial judge to explicate the earlier and later Millar case criteria in definition of screen obscenity—which is the very point since raised in a related trial in Kentucky involving a theatre operator who was also found guilty as to "Deep Throat."

James Umstead Jr. who defended Gordon Craddock of Atlanta's Craddock Films Inc. in an earlier Memphis case involving "School Girl" also sounded off. Craddock had been tried under a more stringent Federal concept of obscenity.

Philip D. Vitello who defended Louis Peraino, president of Bryanston Films of Manhattan for handling "Deep Throat" expressed gratification at the action of the solicitor-general but made no allusion to Turley's rage.

Bruce Kramer, defense lawyer for the actor Harry Reems and an official of the Tennessee unit of the American Civil Liberties Union was equally delighted and thought the Memphis judge ought forthwith to order a new trial in the recent "Deep Throat" convictions. Reems faces separate prosecution here involving another pornopic; "The Devil In Miss Jones."

Delay 'Deep Throat' Sentences

Federal Judge Angry At Bork
As 'Throwing In The Sponge'

By MATTY BRESCIA

Memphis, July 27.

Defense barristers in the elongated "Deep Throat" trial here scored additional points for their clients in "winning" a postponement in the skeddled sentencing of the 13 defendants and three corporations.

At the same time, U.S. Dist. Judge Harry Wellford, who ordered the delay in meting out the jail terms, unleashed a furious blast in open Federal Court, taking U.S. Solicitor-General Robert Bork over the hurdles when he bluntly stated: "the U.S. Solicitor-General (Bork) is just throwing in the sponge in this ('Throat') case."

Wellford consented to chief defense atty. Philip Daniel Vitello's motion "to delay sentencing my clients (Louis Peraino and Bryanston Films) in this matter as well as other defendants in the case."

The sentencing date had been Aug. 6, but the Federal jurist stated that "We (the court) will wait at least 30 days in order to consider post-trial briefs in light of Bork's filing of his brief." Judge Wellford, who previously "denied" the battery of defense counselors motions for a new trial — then further stated: "The status of that (new trial) ruling is now in limbo and we will await the Solicitor-Generals filing of his decision."

Judge Wellford, who presided over more than nine weeks of testimony in the "Deep Throat" matter, admitted that "I was shaken considerably last week when our Solicitor Gen. confessed an error in the government's prosecution of the Kentucky "Deep Throat" Federal

trial. This is most unfortunate and most regrettable in the waste of time, money, and effort in this case," Judge Wellford spoke in a firm voice in a visibly uneasy atmosphere.

Reems Fund Drive

Aug. 6 has been set as the date for the sentencing of Harry Reems in Memphis after his conviction in the "Deep Throat" case. The Memphis court has denied all motions for a new trial effectively ignoring Solicitor-General Robert Bork of U.S. Dept. of Justice who urged the U.S. Supreme Court to apply other obscenity definitions in another, but similar "Deep Throat" conviction, in Kentucky.

"What we have now is a runaway prosecutor in a runaway courtroom," Reems told Variety last week.

Though Reems had hoped that the Memphis sentencing would be delayed pending the U.S. Supreme Court decision in the Kentucky theatreman matter, the Memphis decision means he must now proceed with his appeal immediately after the sentencing. Should the case eventually be sent back to Memphis because of a Supreme Court rethink on what obscenity definitions prevailed, it will mean added appeal costs for the porno actor.

A Reems fund-raiser was held in Chicago last week (22) and contributed approximately \$2,000 to his defense fund. Similar events are now in the works for Philadelphia and Washington, D.C. On Aug. 28, Reems will address the First Amendment Lawyers Assn. in San Diego.

APPENDIX B

An Analysis of the Ginzburg, Mishkin and Fanny Hill Decisions, decided on March 21, 1966, appearing in the National Decency Reporter of June-July 1966.

References:

Motion of Citizens for Decency Through Law, Inc. at page 6, footnote 4.

Brief Amicus Curiae at pages 1 and 35.

AN ANALYSIS OF THE GINZBURG, MISHKIN and FANNY HILL DECISIONS

On March 21, 1966, the U. S. Supreme Court handed down its decisions in three important obscenity cases: *Edward Mishkin v. State of New York*, — U.S. —, 16L. Ed 2d 56, 86 Ct. —; *Ralph Ginzburg et al. v. U. S.*, — U. S. —, 16 L. Ed 2d 31, 86 S. Ct. —, and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of the Commonwealth of Massachusetts*, — U. S. —, 16 L. Ed 2d 1, 86 S. Ct. —. These decisions are herein referred to as the *Mishkin*, *Ginzburg* and *Fanny Hill* cases.

The final results were a major defeat to the smut industry.¹

In *Mishkin* and *Ginzburg*, substantial jail sentences² had been meted out in state and federal courts to defendants, Edward Mishkin and Ralph Ginzburg, after successful criminal prosecutions under state and federal obscenity statutes. Both convictions were affirmed by the U. S. Supreme Court, with the majority opinions voicing a strong denunciation of the "sordid business of pandering—the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."³

¹ *The Wall Street Journal* of March 22, 1966, reported: "The decisions may encourage a nationwide crackdown by local officials on sexy publications and movies. They represented a defeat for civil liberties advocates." *The New York Times* of March 24, 1966, quoted defense counsel Ephraim London of New York as saying: "This is the opening the district attorneys have been looking for." A spokesman for the Los Angeles District Attorney's office commented, as reported in the *Los Angeles Herald Examiner*: "After careful analysis of the Court's 31 page brief, I have concluded that we can successfully prosecute more of the girlie and nudist magazines than ever before."

² Edward Mishkin received a jail sentence of three years, to be spent in the New York City penitentiary. Ralph Ginzburg received a jail sentence of five years, to be served in the Federal penitentiary.

³ *Ginzburg*, at page 36, citing Justice Warren's concurring opinion in *Roth-Alberts*.

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In the *Fanny Hill* case, the attorney general had been successful in the state court in enjoining the sale of *Fanny Hill* in Massachusetts. The Massachusetts judgment was reversed by the U. S. Supreme Court on technical grounds and was sent back to the state court for further proceedings.

The *Mishkin* and *Ginzburg* decisions were clear majority decisions, with a majority of the members of the court joining in the majority opinion and its reasoning. On the other hand, the *Fanny Hill* case was a no-clear-majority decision with no more than three justices agreeing with the reasoning in any one opinion. There was no majority opinion in *Fanny Hill*, nor may any one of the separate opinions be cited as the opinion of the court. For a proper analysis on this latter point, see Justice Musmanno dissenting in *Commonwealth v. Robin*, (*Tropic of Cancer*), — Pa. —, 218 A. 2d 546 (March 22, 1966), reported in *The National Decency Reporter* for May 1966, Vol. 3, No. 5 at Page 5, and Justice Clark's dissenting opinion in *Fanny Hill* at page 18.

Contrary to the erroneous reporting of certain news media, the reversal decided *nothing* as to the merits or demerits of *Fanny Hill* for the six members of the High Court who voted for reversal did so for different reasons. Justices Brennan, Warren and Fortas, in voting for reversal, took note of the "prior restraint" effects of the Massachusetts injunctive statute, with its unusual "conclusive presumption" provision,⁴ and held that the Massachusetts Supreme Judicial Court erred in its interpretation of the *Roth* standard. They said nothing about the "findings of the Massachusetts Judicial Court which they had no occasion to assess." See *Fanny Hill*, *supra*, at p. 6. Their concern was with (1) the Massachusetts court's interpretation of *Roth-Alberts*, namely, that a book found to have some minimal literary value and one which could be said to play a part in the history of the development of the English novel could be barred as to all, including those who would use the same for its legitimate values, and (2) the fact that a judgment of "obscene" under the injunctive device would be conclusive in later criminal pro-

⁴ This "conclusive presumption" provision is criticized by the drafters of the Model Penal Code. See Reporter's comments to 1957 draft at page 51.

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ceedings against individuals who would distribute such matter for its legitimate values. Justices Black and Douglas voted for reversal on the grounds that they did not believe in the obscenity statutes. Justice Stewart voted for reversal on the grounds that *Fanny Hill* was not "hard-core pornography."

CDL attorneys view the majority opinions in *Mishkin* and *Ginzburg* as a reaffirmation of common law principles and the views espoused by Justice Learned Hand. The three decisions stand as the most important obscenity rulings in this nation's history.⁵ Acting as precipitants, they have erased the doubts which clouded what many have regarded as muddied waters. See the opinion of Circuit Judge Moore in *U. S. v. Klaw, et al.*, 350 F. 2, 155 at 165 (July 15, 1965).

Highlighting the opinions was the agreement of a majority of the court:⁶

- (1) (a) To accept the "variable" approach to obscenity as being within constitutional standards⁷ and
- (b) in their review of convictions involving the Federal Postal Statute, to follow pre-*Roth* federal de-

⁵ *The Cleveland Plain Dealer* of March 28, 1966, reported Charles Keating, Chairman of CDL, as saying: "The Supreme Court decisions of March 21 make it a different ballgame. . . . Any area that decides to rid itself of obscenity can do so by competent enforcement and vigorous prosecution. There is no excuse for pornographers to be in business after the court's decision."

⁶ In its previous decision treating obscenity *vel non*, in *Jacobellis v. Ohio*, decided June 22, 1964, the United States Supreme Court did not file an Opinion of the Court inasmuch as the justices could not agree upon the reasoning for the reversal. None of the written opinions of the several justices in that case carried the force of an "Opinion of the Court." See Justice Michael Musmanno, dissenting in *Commonwealth v. Robin* (*Tropic of Cancer*), — Pa. —, 218 A. 2d 546, March 22, 1966, reported in *The National Decency Reporter* for May, 1966, Vol. 3, No. 5, at page 5. In the *Mishkin* and *Ginzburg* cases, however, the Court did file a majority opinion. There is no doubt whatsoever that what the majority opinion says in the latter cases is the law.

⁷ See *Mishkin*, at page 62: "We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient groups; . . ."

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cisions which had applied one aspect of the variable concept (pandering).⁸

(2) That the so-called "hard-core pornography" test is no part of the *Roth-Alberts* standard, the latter being less restrictive than the former.⁹

(3) That constitutional requirements for scienter do not require proof of "subjective knowledge." Because the court interpreted the New York statute to require proof equivalent to "knowingly or recklessly," it found it unnecessary to define "what sort of mental element is required to a constitutionally permissible prosecution," i.e. whether "honest mistake" need be made a defense.

(4) To continue its previous adherence to the American Law Institute Model Penal Code concepts.¹⁰

⁸ See Ginzburg, at pages 36, 38, and 39:

At p. 36: "Besides testimony as to the merit of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."

At p. 38: "And the circumstances of presentation and dissemination of material are equally relevant to determine whether social importance claimed for material in the court room was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the market place, or a spurious claim for litigation purposes."

At p. 39: "The decision in *Rebhuhn v. U. S.*, 109 F. 2d 512, is persuasive authority for our conclusion."

⁹ See Mishkin, at pages 60 and 61:

At p. 60: "Indeed, the definition of 'obscene' adopted by the New York courts in interpreting Section 1141 limits a narrower class of conduct than that delimited under the *Roth* definition, *People v. Richmond County News, Inc.* . . ."

At p. 61: "The New York courts have interpreted 'obscenity' in Section 1141 to cover only so-called 'hard-core pornography,' see *People v. Richmond County News, Inc.*, 9 N. Y. 2d 578, 586, 587, 175 N.E. 2d 681-685, 686 (1961), quoted in Note 4, supra. Since that definition of 'obscenity' is more stringent than the *Roth* definition, the judgment that the constitutional criteria are satisfied is implicit in the application of Section 1141 below."

¹⁰ The majority opinions in Ginzburg and Mishkin cited the American Law Institute, Model Penal Code four times with approval. See Mishkin at page 63, fn 9 (scienter) and Ginzburg at page 38, fn 12; at page 39, fn 14; and page 40, fn 19 (pandering).

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(5) That relevant evidence on the issue of scienter in "publishing" cases includes:¹¹ (a) the publisher's instruction to his artists and writers; (b) any efforts of the defendant to disguise his role in the enterprise; (c) titles, covers and illustrations which demonstrate the transparency of the character of the material; (d) the number of obscene books published and possessed for sale; (e) the repetitive quality of the sequences and formats of the books; (f) exorbitant prices marked on the books.

(6) That relevant evidence on the issue of obscenity includes:¹² (a) evidence showing that the material in question was sold as stock in trade of a business purveying textual or graphical matter openly advertised to appeal to the erotic interest of its customers; (b) advertising which gives an indication of the "leer of the sensualist;" (c) the manner of solicitation. If the nature of the material is such that it has "social redeeming importance" to a limited audience, such as psychiatrists, physicians, psychologists, etc., was the solicitation or distribution directed to the proper audience or was it indiscriminate?

(7) That whether material has "redeeming social importance" depends upon the circumstances of its presentation and dissemination.¹³ The social importance claimed must be the basis upon which it is traded in the market place and may not be a spurious claim for litigation purposes.

Equally as important as the agreement noted above, was the disagreement noted among the members which constituted the majority in *Mishkin* and *Ginzburg*, when the case under review was an injunction, rather than a criminal prosecution. Once again the hazards of the injunctive or "in rem" procedure were underscored.¹⁴

¹¹ See Mishkin, at page 63.

¹² See Ginzburg, at page 36, 37, 39.

¹³ See Ginzburg, at page 38.

¹⁴ In a special edition of *The National Decency Reporter*, reporting on a June 22, 1964 decision, CDL made the following comment: "To entertain an opinion that the injunctive device is a useful tool in the war against obscenity is unrealistic. An examination of *Kingsley Book, Inc. v. Brown*, 354 U. S. 436 (1957) and the majority opinion in *A Quantity of Copies of Books v. Kansas* bears this out." CDL has stressed the importance of the criminal forum. See NDR, Vol. 2, No. 6 (Feb. 1965) at page 2; Vol. 2, No. 12 (Sept. 1965) at page 7. The attorney general of Massachusetts entertains a different view. In a letter to all district attorneys and city

The failure to agree upon an "Opinion of the Court" in the *Fanny Hill* case did not, however, detract from the impact of the majority opinions in the *Mishkin* and *Ginzburg* cases. The differences among the members of the *Mishkin* and *Ginzburg* majority court, expressed in separate opinions in *Fanny Hill*, are not as irreconcilable as it might seem. All that Justices Brennan, Warren and Fortas said in their *Fanny Hill* opinion was that if there were such a finding of slight historical or literary value (note that the three Justices did not say that such was required under the record before them) then, under the *Roth* test, distribution for such limited purposes constituted "redeeming social value" under such circumstances and those distributions could not be enjoined. The three Justices would have decided the case on a very narrow constitutional issue. They also acknowledged the "pandering" aspects of *Fanny Hill*, and noted that such might be enjoined. See Point F, *infra*.

A.

SUPREME COURT HOLDS VARIABLE APPROACH TO OBSCENITY IS CONSISTENT WITH CONSTITUTIONAL STANDARDS

By far the most important issue resolved by the three decisions was the agreement by a majority of the court that the so-called "variable" approach to obscenity, as the latter term was defined in *Roth-Alberts*, did not offend First Amendment constitutional safeguards. The three decisions taken together constitute a strong endorsement of the American Law Institute Model Penal

prosecutors dated Dec. 7, 1965, he announced a statewide policy to use the "in rem" proceedings and threatened to "nol pros" any criminal proceedings commenced by local prosecutors against a book distributor or dealer without the prior approval of his office. His office carried out this threat in a New Bedford case. On Nov. 11, 1965, Peter Saba was convicted of selling an obscene book (*Sexus*) and sentenced by the trial judge to one year in jail and fined \$1,000. On Jan. 1, 1966, a representative for the attorney general appeared in the district court and nolle prosequed the case!

Code obscenity statute, which codifies the variable obscenity concept, and the CDL Model Obscenity Statute¹⁵ which follows the variable obscenity approach of the Model Penal Code.

1. VARIABLE AND CONSTANT OBSCENITY

In the *Roth-Alberts* case, the majority opinion of the U. S. Supreme Court held that "obscene material is matter which deals with sex in a manner appealing to prurient interest" and announced a constitutional standard for judging obscenity which was to serve as a beacon for federal and state legislatures in drafting obscenity statutes, namely, "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." As a beacon, the constitutional standard functioned to define the limits of legislative and judicial power in this area of sexual expression.

There was, however, much which was left unanswered by the standard enunciated in *Roth*, the most important being, "Is obscenity a constant quality? (considered in the abstract)" and the subsidiary question, "Whose prurient interest?" Was it always the average person in the community? (presumably a constant factor); or did it refer to the average person of the group to whom the material was aimed? (very definitely, a variable factor). The *Roth* and *Alberts* cases did not raise these issues, nor did that decision develop "all the nuances"¹⁶ of the constitutional standard.

Previous state and federal decisions had taken into account the latter concept, commonly known as "variable" obscenity, which considers not only the subject matter but also its use, i.e. the probable audience of the subject matter. In *Parmalee v. U. S.*, 113 F. 2d 729, 731 (D. C. Circuit 1940) Justice Miller of the Circuit Court of Appeals had said, "A book must be considered as a whole, in its effect, not upon any particular class but upon all those whom it is likely to reach." (Our emphasis.)¹⁷

¹⁵ See "Commentaries on the Law of Obscenity," Vol. 1, No. 1, at pages 43 to 52.

¹⁶ See *Mishkin*, *supra*, at page 62, fn 7.

¹⁷ An instruction to this effect had been cited with approval by the U. S. Supreme Court in *Roth* at page 490: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach."

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Where a pamphlet "Sex Side of Life" for the sex instruction of minors was advertised and distributed in such a manner so as to reach the proper audience, i. e., "adults" and "agencies that have the real welfare of the adolescent in view," it had been held that under those circumstances it was not obscene, *U. S. v. Dennett*, 39 F. 2d 564 (2d Circuit 1930). On the other hand, where a book "*Sex Life in England*" which had a limited legitimate audience, i. e., anthropologists, psychotherapists, etc., was so advertised and distributed as to reach those who would buy and use it for its prurient appeal, it had been held that the subject matter was obscene. *U. S. v. Rebhuhn*, 109 F. 2d 512, 514-515 (2d Cir. 1940); *U. S. v. Burstein*, 178 F. 2d 665 (9th Cir. 1949).

In determining the probable audience, (its use) the nature of the advertising and promotional material, the reputation of the publisher, the channels of distribution and the price of the edition, had all been considered to be relevant on the issue of obscenity.

On the other hand, under "constant" obscenity concepts, the approach is different. Material is dealt with in the abstract, and is classified as "obscene" or "not obscene" independent of the time, place, and circumstances of the material's employment.

Prior to the three decisions on March 21, there was every reason to believe that the constitutional standard voiced in *Roth* would accommodate "variable" obscenity. Not only had the majority opinion in *Roth* cited with approval several of the cases which followed that principle,¹⁸ but it also had cited with approval the 1957 draft of the American Law Institute Model Penal Code which in part is grounded upon that concept.¹⁹ The variable approach had been adopted by Justice Warren in his concurring opinion in *Roth*.²⁰ The court, however,

¹⁸ *Roth*, *supra*, at page 489, fn 26.

¹⁹ *Roth*, *supra*, at page 487, fn 20.

²⁰ See *Roth*, *supra*, at p. 495: "It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the material is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting. . . ."

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in its majority opinion, neither accepted nor rejected Warren's concurring remarks.

2. VARIABLE OBSCENITY IN THE LIGHT OF ROTH STANDARDS

Under the "variable" obscenity approach, the term "obscene" as defined in *Roth-Alberts* functions in accordance with two variable factors: (1) The nature of the materials, and (2) The use of the materials, i. e., the manner in which they are employed.

Under "variable" obscenity, the most objectionable material imaginable (Variable Factor 1) would not be obscene when used by a proper audience (Variable Factor 2).²¹ Conversely, material of a less objectionable nature (Variable Factor 1) may be obscene when used improperly, i. e., for the sole purpose of pandering to the prurient interest (Variable Factor 2).²²

Such evidence may come from either the prosecution or the defense, depending upon who has the burden of going forward with the evidence, and bearing in mind that it is always the prosecutor's burden to establish the violation beyond a reasonable doubt. This was graphically illustrated in the majority opinions in the *Mishkin* and *Ginzburg* cases.

In the "Housewife's Handbook on Selective Promiscuity" counts in *Ginzburg*, the United States Government, during its case in chief, presented evidence tending to establish indiscriminate mailings and *Ginzburg's* intent to pander. Such was sufficient to support the trial court judgment. Had *Ginzburg* wished to rely on the book's non-prurient appeal in the hands of a special audience of doctors, etc., it was his burden to introduce evidence in order to overcome the People's *prima facie* case. Cf. *U. S. v. 31 Photographs, etc.*, 156 F. Supp. 350 (D. C. SDNY 1957), cited with approval in *Ginzburg* at footnote 15, where the trial judge acquitted members

²¹ See *U. S. v. 31 Photographs*, 156 F. Supp. 350 (DCSD NY 1957) cited for comparison in *Ginzburg* at p. 40, fn 15. Involving the use by Kinsey scientists of what was conceded to be blatant pornography (for research).

²² See *U. S. v. Rebhuhn*, 109 F. 2d 512 (2nd Cir. 1940) cited with approval in *Ginzburg* at p. 39 and p. 40, fn. 15. where a book "*Sex Life in England*" having a limited legitimate audience of anthropologists and psychotherapists was indiscriminately advertised and disseminated in the mail.

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of the special audience when the purpose of the distribution was shown to be the social value (rather than the prurient interest) to the special audience of sociologists.

In *Mishkin v. New York*, the People introduced proof of the appeal of the material to a special audience during their case in chief, which supported the judgment on appeal.

This result is not startling, nor is it inconsistent with the majority decision in *Roth*. Quite the contrary, it draws into focus and clarifies the *Roth* concepts which reject obscenity as "utterly without redeeming social importance" and equate obscenity with "pandering" to the prurient interest. In the former situation the use of the material under the circumstances establishes the material as having "redeeming social importance" whereas in the latter situation the "pandering" use establishes the material as "utterly without redeeming social importance." The court in *Ginzburg* at page 36 defines "pandering" as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."

3. VARIABLE OBSCENITY AS AFFECTED BY THE FORUM

To arrive at a determination under the variable concept, both factors (nature of the material and use of the material) must be present. Thus, the principle functions ideally in the criminal forum, but poorly in the equity forum (injunctive remedy). The former supplies the ingredients necessary to a consideration of the use factor, since the criminal courts consider factual situations and criminal conduct (use). Conversely, in the injunctive or "in rem" action, where historically the action has concentrated on the "thing," the necessary ingredient of use has been lacking. Where used, the "in rem" action, has heretofore been a breeding ground for "constant" obscenity concepts and confusion in the courtroom.²³

²³ *Attorney General v. The Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N.E. 2d 328 (1962); *McCauley v. Tropic of Cancer*, 20 Wisc. 2d, 134, 121 N.W. 2d 545 (1963); *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal Rptr. 800, 383 P. 2d 152; *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399, 200 N.E. 2d 760, 252 NYS 2d 71 (1964); *Grove Press Inc. v. Gerstein*, 378 U. S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035, reversing 156 So. 2d 539; *Tralins v. Gerstein*, 378 U. S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033, reversing 151 So. 2d 19. Cf the dissenting opinion of Justice Michael Musmanno,

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In the two criminal cases which were before the U. S. Supreme Court for review, variable obscenity was a major issue; in the civil injunction case, it was not.

Variable obscenity was an issue in *Mishkin*, a criminal case, because of (1) the form of the New York statute which proscribed sadistic and masochistic materials, having an appeal to a special audience of sexual deviates and (2) the nature of the People's proof. It was an issue in *Ginzburg*, also a criminal case, (although not argued by the Solicitor General in his brief on appeal) because of (1) the theory upon which the U. S. Attorney tried the case and the nature of the proof at the trial and (2) the interpretation which federal judges (notably the late Justice Learned Hand) had given the federal postal statute in prior federal decisions.

On the other hand, the *Fanny Hill* case was decided by the state court on "constant" obscenity principles, having been tried in a civil action on an injunction. Neither the publisher nor the Government argued variable concepts either during the trial, or in their briefs on appeal.

4. VARIABLE OBSCENITY SHOULD NOW BE CONSIDERED IN CIVIL ACTIONS

Although the *Fanny Hill* result was not the clear-cut decision that the *Mishkin* and *Ginzburg* decisions were, that decision, in many respects, was the most informative.

The *Fanny Hill* decision is of particular importance because of the manner in which the Brennan-Warren-Fortas opinion gratuitously injected "variable" concepts into that action—an action which traditionally had neglected that consideration.

In fact, the "variable-constant" obscenity controversy was the focal point which distinguished the "no clear"

in *Conn v. Robin et al. (Tropic of Cancer)*, — Pa. —, 218 A2 546, Mar. 22, 1966: "But even in the extreme hypothesis that the Gerstein case should be viewed as a precedent of some kind, it can never, under any circumstances, be regarded as a protected work under all circumstances and condition. The majority opinion here, therefore abdicates its responsibilities by arbitrarily stating that Gerstein is all-controlling, all-powerful and all-omniscient."

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majority *Fanny Hill* result from the clear majority result reached in *Mishkin* and *Ginzburg*. See *Ginzburg* at page 5:

"This constituted the entire evidence, as neither side availed itself of the opportunity provided by the section to introduce evidence 'as to the manner and form of its publication, advertisement, and distribution,'"

and footnote 3:

"The record in this case is thus significantly different from the record in *Ginzburg v. U. S.*, and *Mishkin v. New York* . . ."

In *Fanny Hill*, Justices Brennan, Warren and Fortas split with the White-Clark-Harlan trio (which constituted the majority of six and accepted the variable approach in the *Mishkin* affirmance) because of the unwillingness of Justices Brennan, Warren and Fortas to think in terms of "constant" obscenity (obscenity in the abstract), even in injunction cases.

The dictum in the Brennan, Warren, Fortas opinion, in the only case which did not draw in issue the variable issue, suggests that the variable approach may now be an essential consideration of the injunctive approach if such is to be upheld in the U. S. Supreme Court.

5. VARIABLE OBSCENITY PRECLUDES THE USE OF COMPARABLES WHERE PANDERING IS PROVED DURING THE STATE'S CASE IN CHIEF

Under the concept of constant obscenity which had previously prevailed, there was a split of authority as to whether other materials appearing in commerce and trade were relevant in an obscenity trial.

One body of authority is represented by the rule expressed in *State v. Ulsemer*, 24 Wash. 657, 659, holding that the defendant was precluded from using similar materials appearing in commerce and trade in that the same was incompetent because such use would not palliate the use by the defendant. See also *N. Y. v. Finkelstein*, 229 N. Y. Supp. 2d 367, 371, cert. denied 371 U. S. 863; *Womack v. U. S.*, 111 US App DC 8, 294, F2, 204, 206, cert. denied, 365 US 859.

A refinement of the above rule was expressed by Judge Fox in *U. S. v. West Coast News Co.*, 228 F. Supp. 171 (1964) Affd in 357 F2, 855 (1966). In the *West Coast News Co.* case, Judge Fox held that comparables

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would only be admissible if a proper foundation had been laid which included the use of a qualified expert on *voir dire* outside the presence of the jury to demonstrate to the trial judge (1) the similarity of the proffered comparables and (2) their acceptability to the standards of the community. In that case the trial judge held that the defendant's burden had not been met.

An opposing view was expressed in *Maryland v. Yudkin*, 182 A. 2d 798, 802. It appears, however, that the Maryland Court of Appeals did not consider the above-cited contrary authorities, as no analysis of its conclusion appears in the opinion. The Court cited only Harlan's concurring opinion in *Smith v. California*, *supra*; and the California Supreme Court decision in *In Re Harris*, 366 P. 2d 305. An examination of the latter authority, however, reveals that the holding of that case does not stand for the proposition that the admission of allegedly comparable materials is required; only that the defendant under the facts of that case was denied due process because he had been precluded from presenting any evidence in his defense.

It seems clear that, under the Court's approval of the variable obscenity approach, the use of allegedly comparable materials is irrelevant where the State's evidence indicates that the defendant was pandering. At the very least, an additional burden is placed upon the defendant in laying the foundation to establish relevancy; namely, that under the circumstances he was not pandering. This is nothing more than an application of the basic rules of evidence. See *Jones on Evidence*, §156, p. 279.

"While proof of collateral facts may be admitted on the ground that the facts are relevant to the issues in the case, there is one condition that is implicit in substantially every case in which such facts are received in evidence: A rational similarity or resemblance between the conditions giving rise to the fact offered and the circumstances surrounding the issue or fact to be proved. Thus it may be competent to explain the nature of objects by experiments and by comparison with other objects, providing that preliminary proof is made that the conditions are the same." (Our emphasis.)

B.

SUPREME COURT HOLDS "HARD CORE PORNOGRAPHY"
RULE AN INCORRECT INTERPRETATION OF ROTH-ALBERTS

An equally strong setback for the smut industry was the U. S. Supreme Court's pronouncement in *Mishkin* that the so-called "hard-core pornography" test was no part of the *Roth-Alberts* constitutional standard.²⁴

The ruling of six justices in the *Mishkin* case at page 60 that:

"The definition of 'obscene' adopted by the New York courts . . . (in *People v. Richmond County News*) delimits a narrower class of conduct than that delimited under the *Roth* definition."

and at page 61, the so-called "hard-core pornography" interpretation of the *Richmond County News Company* case:

"is more stringent than the *Roth* definition." upset the reasoning of High Courts in New York, Massachusetts and California which had previously established the hard-core pornography rule in those states under the mistaken assumption that only hard-core pornography could be proscribed under the *Roth-Alberts* decision.

The hard-core pornography interpretation sprang into existence in 1961 in the *Richmond County News Company* case²⁵ through a misinterpretation of the *Roth* test by two members of the New York Court of Appeals. In that case, after a fact-finding by three judges at the trial level and five judges in the Appellate Division, that the April 1957 edition of the girlie magazine *Gent* was obscene under the New York statute, the New York Court of Appeals in a four-to-three vote reversed the criminal conviction on the grounds that the prohibition of the New York Penal Statute applied only to hard-core pornography.

²⁴ See Note 9. See generally "Modern Concept of Obscenity, Section 6, Hard-core Pornography," appearing in 5 ALR 3rd, 115 at 1176.

²⁵ *New York v. Richmond County News Company*, 175 N.E. 2d, 681 (May 25, 1961).

Although four justices in the *Richmond County News Company* case voted for reversal, two of these, Justices Desmond and Dye, did so because they considered themselves restrained by *Roth-Alberts*, which they interpreted to permit the proscription of hard-core pornography only. Justices Fuld and Van Voorhis, on the other hand, interpreted the New York statute to go beyond the *Roth-Alberts* test by proscribing hard-core pornography only.

The same erroneous reasoning soon spread to the High Courts of the two other states. One year later, the Supreme Judicial Court of Massachusetts followed the New York lead and accepted the hard-core pornography interpretation²⁶ also by a four-to-three majority, leaning on the result reached by the slim majority of the New York court in the *Richmond County News* case. The following year, the California Supreme Court ruled similarly²⁷ but this time by a seven-to-nothing majority, relying on the results reached by the slim four-to-three majorities of the New York and Massachusetts courts.

The successful inroads made by the hard-core rule in New York, Massachusetts and California during 1961-1963 can be attributed to the failure of the U. S. Supreme Court in its opinions between 1957 and 1966 to get across the idea that a reversal on procedural grounds was in no way a reflection of the majority's view on the obscenity of the subject matter, or the criminal culpability of the purveyors involved.²⁸

The state courts failed to give proper weight to the prior restraint issue which existed in the U. S. Supreme Court reversals following *Roth*, and were unable to discern the differing results reached by the U. S. Supreme Court in its review of criminal²⁹ and prior restraint

²⁶ *Attorney General v. Book Named "Tropic of Cancer."* 344 Mass. —, 184 N.E. 2d 328, 333 (July 17, 1962).

²⁷ *Zeislin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 810 (July 2, 1963).

²⁸ The prosecutors are equally at fault. As a practical matter they should have understood what the Court was doing when it denied *certiorari* or dismissed appeals in 22 criminal cases in the intervening seven years, notwithstanding the general understanding that the denial of *certiorari* does not merit the position of *stare decisis*.

²⁹ See "Commentaries on Law of Obscenity," Vol. 1, No. 1, pp 15-24.

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cases. While the California Supreme Court³⁰ did recognize the prior restraint issue, they failed to weigh the issue in the light of the results reached in the many other criminal cases treating conduct, which had been appealed to the U. S. Supreme Court during the same period and denied review.

The failure of the U. S. Supreme Court in its previous opinions to articulate the actual state of the law has been amply corrected by the majority opinions in the *Mishkin* and *Ginzburg* cases. Happily, the damage occasioned is not irreparable. It is reasonable to expect that, as a result of the *Mishkin* ruling, the New York, Massachusetts, and California High Courts and the respective state legislatures will be called upon in the future to correct the erroneous interpretation by re-evaluation in the judicial forum and by new legislation.

A move in that direction has already commenced in California. On May 3, 1966, the proponents of an initiative measure in California filed 554,530 voter signatures with the Secretary of State asking that a new obscenity statute be placed on the ballot in the November general election. The proposed state obscenity statute (initiative) would replace the existing California State statute which has been given a "constant obscenity" - "hard-core" interpretation with one drafted along the lines of the American Law Institute, Model Penal Code (variable obscenity), given the U. S. Supreme Court's stamp of approval in *Mishkin* and *Ginzburg*. 468,259 valid voter signatures (8% of the registered voters in 1962) are necessary in order for the measure to qualify for submission to the General Electorate.

In Massachusetts, the attention of the Legislature is invited to the remarks of Chief Justice Wilkins in his dissent in the Massachusetts case which adopted the hard-core pornography rule in Massachusetts. "Because of its impact . . . the majority decision will have a wide practical effect. It should lead to legislative re-examination of the entire field."

It now appears that the dissent of Justice Froessel,

³⁰ *Zeitlin v. Arnebergh* at p. 810, fn 23. The California Supreme Court also leaned heavily on Justice Harlan's view of hard-core pornography, but failed to recognize that Justice Harlan would not apply his restriction to state cases.

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concurred-in by Justices Burke and Foster, is the correct statement of the law. New York law enforcement officials would do well to use Justice Froessel's fine dissent as a weapon and move to correct the New York situation by either (1) seeking a reinterpretation of the New York Obscenity statute by the New York Court of Appeals or (2) amending the Obscenity Statute so that it codifies the law expressed in *Roth-Mishkin-Ginzburg*. In the latter situation, logic points to the Obscenity Statute of the American Law Institute, Model Penal Code which, if enacted, would overrule such unfortunate results as the *Richmond County News Company* case (*Gent*); *Larkin v. G. P. Putnam's Sons*, 14 N. E. 2d 399 (July 10, 1964) (*Fanny Hill*); *New York v. The Bookcase et al.*, 14 N. Y. 2d 409 (July 10, 1964) (*Fanny Hill-Minors*); and *Larkin v. G. I. Distributors, Inc.*, 14 N. Y. 2d 399 (July 10, 1964) (*Girlie Magazines*).

C.

SUPREME COURT APPROVES "SCIENTER" REQUIREMENT OF NEW YORK STATUTE. REJECTS ARGUMENT THAT PEOPLE HAVE BURDEN OF PROVING SUBJECTIVE KNOWLEDGE - AVOIDS "HONEST MISTAKE" ISSUE.

1. AN INTRODUCTION TO SCIENTER

One of *Miskin's* points on appeal was that the State had failed to prove "scienter." His argument had two prongs: (1) that the People's burden of proof under the New York statute was to show that the defendant *knew* (subjectively) that the subject matter was obscene, and (2) that the People's evidence had not met that burden.

Although the identical arguments had earlier been considered and rejected in *New York v. Finkelstein*, 11 N. Y. 2d 300, 229 NYS 2d 367, 183 NE 2d 661, cert. den. 371 U. S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962), the ruling of the U. S. Supreme Court on this issue in *Mishkin* is important because it was the first case in which the Court had written an opinion on the "scienter" issue since its landmark decision in *Smith*

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v. *California*, 361 U. S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959), established scienter as a constitutional requirement.

The majority opinion in *Mishkin* made it quite clear that proof of subjective knowledge was not a constitutional requirement. Its construction that the New York statute required proof equivalent to "knowingly or recklessly" avoided the "honest mistake" issue, which had been left undecided in the *Smith* case.

To grasp the full significance of the *Mishkin* decision on "scienter," requires a clear understanding of the "scienter" problem background, including the Court's decision in the *Smith* case.

(a) The *Smith* Case Adds Scienter As a Constitutional Requirement

The "scienter" requirement came into the law through Justice Brennan's opinion in *Smith v. California* (*supra*).

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled *Sweeter Than Life* by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California State Obscenity Statute, and a Los Angeles City Ordinance on Obscenity. Smith was charged only with a violation of the City Ordinance. The difference in the two statutes is explained by Judge Swain in his dissenting opinion in *People v. Smith*, C. R. A. 3792, 237 P. 2d 636 (June 23, 1958), which affirmed Smith's conviction at page 641):

"A defendant is not guilty of violating Penal Code Section 311 unless he had knowledge of the character of the material. *People v. Wepplo*, *supra*, 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials. To appear profound, we refer to this knowledge or notice as 'scienter.' Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does . . ." (Our emphasis.)

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The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to the U. S. Supreme Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and Whittaker) ruled that a state cannot constitutionally eliminate all mental elements from the crime; to do so seriously restricted the dissemination of books that are not obscene.

If "mental element" was a requirement for criminal prosecution, then, what was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? These were all matters of great concern to the countless numbers of municipal, county, and state governments and their prosecutors, whose "non-scienter" ordinances and statutes would fall with the Los Angeles City ordinance in the *Smith* decision.

(b) The Mental Element (Defendant's State of Mind)—Must It Be Subjective Or Objective?

As to the prosecutor's concern regarding a "scienter" requirement, consider the "state of mind" spectrum where "subjective knowledge" is concerned, as applied to a person who has sold a book which is obscene as a matter of fact. Degrees of "subjective knowledge" are listed in inverse order:

- (1) He may have been aware of the fact that the material was obscene from personal evaluation (knowledge of fact);
- (2) He may have believed the fact the material was obscene, but his awareness was not from personal evaluation (knowledge of fact);
- (3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowledge);
- (4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (knowledge contrary to fact—criminal negligence);
- (5) He may have believed the book not obscene, but have had reasonable grounds for his belief (knowledge contrary to fact—reasonable grounds) (honest mistake).

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At common law an honest and reasonable belief in the existence of circumstances, which if true, would make the act for which the person was charged an innocent act, category (5), constituted a good defense.

Several statutory crimes are to be noted as exceptions however—situations in which the deed, even under the circumstances as they were reasonably supposed to be, involved such a degree of social fault that the actor was held to have acted at his own peril. Statutory rape is such an offense. The state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he *reasonably* believed she was over that age. See, however, *California v. Hernandez*, 39 Cal. Rptr. 361 (July 9, 1964), where the California Supreme Court gave a new interpretation overruling long-standing precedent.³¹

(c) What The *Smith* Case Said About the "Mental Element" Requirement And The State's Burden Of Proof.

The Supreme Court noted in its majority opinion in *Smith* at page 153, footnote 9, that:

"The common law prosecutions for the dissemination of obscene matter strictly adhered to the requirement of scienter . . . Cf. . . . American Law Institute, Model Penal Code, Section 207.10 (7), tentative draft No. 6, May 1957, and Comments, pages 49-51."³²

³¹ The California Supreme Court noted however that the decision was based on "legislative intent":

"We hold only that in the absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking." (Our emphasis.)

Although the philosophical bend of the California justices runs contrary to that expressed by their predecessors, the path is open for the people, through their legislators, to overrule the philosophy of the *Hernandez* case.

³² The American Law Institute, Model Penal Code, Commentary at p. 49 reads:

"Under prevailing obscenity laws, the prosecution must prove that defendant knew or, at least was reckless as to the presence of objectionable material in a book or other publication disseminated by him. It does not have to prove that defendant was aware of the evil tendency of the material. . . ." (Our emphasis.)

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"The general California obscenity statute, Penal Code Section 311 requires scienter," see note 3, and was of course sustained by us in *Roth v. U. S.*"

The Court answered the People's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, at page 154:

"It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, "The Role of the Will in Law," 68 Harvard Law Review 1, cf. *American Communications Association v. Douds*, 339 U. S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

The Court did, however, leave a small area undecided—whether the defense of "honest mistake" in certain cases might be essential as a matter of constitutional principle, at page 155:

"We need not and most definitely do not pass today on . . . whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse . . ." (Our emphasis.)

On this point see category (5) of "The Defendant's State of Mind" noted above.

It seems clear from the above language that the Court was *not* considering "scienter" in the narrow terms of the seller's "subjective knowledge" that the matter was obscene. Categories (3) and (4) were not exempted; category (5), "honest mistake," was the only question mark.

³³ See the interpretation given California Penal Code, Section 311 by Judge Swain in CRA 3792 (*supra*), making use of the "reasonable and prudent man" test.

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At the very least³⁴ the Court, in its opinion in *Smith* at page 212:

"We need not and most definitely do not pass today on what sort of mental element is requisite for a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether the contents in fact constitutes obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate farther, or might put on him the burden of explaining why he did not, and what such explanation might be . . ."

seems to be saying that where the proof shows that (1) the material is in fact obscene, and (2) the seller has knowledge, or is aware of the contents or nature of the materials, a *prima facie* case³⁵ within constitutional limitations will have been established on the scienter issue to permit the matter to go to the jury. This should be so, because a person can be charged with knowledge

³⁴ Although the Court, in *Smith* said:

"We need not and most definitely do not pass today on what sort of mental element is requisite for a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether the contents in fact constitutes obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate farther, or might put on him the burden of explaining why he did not, and what such explanation might be . . ."

only the first caveated area, that of "honest mistake," relates to the subjective state of mind of the defendant, and there, the area of doubt is whether or not it shall be a defense. This would not be a concern of the people's case in chief. It would only be a consideration if offered as a defense, and then, as to whether additional evidence were necessary in rebuttal. The remaining caveats relate not to the defendant's state of mind but rather to whether or not the burden of proof may be shifted, as suggested by the drafters of the Model Penal Code, in their alternate proposals in the 1957 draft. See text, *infra*.

³⁵ *Prima facie* evidence is sufficient to outweigh the presumption of innocence, and, if not met by opposing evidence, to support a verdict. 219 U. S. 219, quoting 6 Pet. 632.

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of the community standards and what a jury may decide to be obscene at any given time. See *Rosen v. U. S.*, 161 U. S. 606 (1896), cited for this latter proposition by the modern court in the *Roth-Alberts* case at 491, fn. 28.

(1) Subjective Knowledge as Affected by the *Rosen* Case.

The *Rosen* case held subjective knowledge of obscenity irrelevant. There the defendant was convicted under a federal statute which made it a misdemeanor to "knowingly deposit obscene matter in the mail." The trial court had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant *knew* that the matter was obscene. On appeal, the U. S. Supreme Court said at page 610:

"The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the questions as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice³⁶ of what, in this enlightened age, is meant by decency, purity, and chastity in social life and what must be deemed obscene, lewd and lascivious." (Our emphasis.)

Any doubt that the *Rosen* case is still the law on this point should have been dispelled by the approval given to this very quotation in *Roth v. U. S.*, 354 U. S. 476, 291 at fn 28. In short, when one deliberately enters the

³⁶ We read this as a complete answer to the defense argument that the prosecution must prove community standards during its case in chief.

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distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. If it be thought that this puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in *Nash v. U. S.*, 229 U. S. 373, 377, cited in *Tyomies Publishing Co. v. U. S.*, 211 F. 385:

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine, or a short imprisonment, as here, he may incur the penalty of death. An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it by common experience in the circumstances known to the actor. The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw . . ."

(2) Do the Facts of the *Rosen* Case Give Rise to a *Prima Facie* Presumption of Knowledge?

No matter how strict the language of the statute setting forth the scienter requirement, and independent of whether "honest mistake" is a defense, proof by the People that a defendant had knowledge of the contents of the material found to be obscene, should, at the very least, under the *Rosen* rule, establish a *prima facie* case against the defendant, functioning like a *prima facie* presumption.

Although it is fundamental to the criminal law that a defendant is presumed to be innocent until the contrary is proved, that the burden of proving the contrary rests with the People all during the trial, and that in case of a reasonable doubt the defendant is entitled to acquittal, such principles are subject to a number of practical exceptions.

One of the exceptions is that the burden of going forward with the evidence³⁷ may be shifted to the de-

³⁷ The burden of going forward with the evidence (not the burden of proof) has been termed the burden of producing evidence and means the obligation of a party to introduce evidence where necessary to avoid the risk of a preemptory finding against him on a material issue of fact. *California Evidence*, Witkin at page 71. See also *McCormick on Evidence*, page 636.

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fendant by a presumption which meets the test of constitutional due process: i.e., where there is a rational connection between the facts proved (as here, that the subject matter is obscene and that the defendant had knowledge of the contents of the subject matter) and the additional facts presumed (that the defendant was aware the subject matter was obscene). See *California Evidence*, Witkin, at page 74.

(3) Model Penal Code Drafters Recommend a *Prima Facie* Presumption of Knowledge.

The American Law Institute, Model Penal Code (1957 draft), Section 207.10 offered two alternatives to the prevailing statutory law on "scienter." Both were designed to change the prevailing law on "scienter" in the obscenity area. See the Reporter's comments to the American Law Institute, Model Penal Code (1957 draft), Section 207.10 at page 49 et seq.:

"Prevailing law is even rougher, absolutely precluding any defense based upon defendant's misappraisal of the tendency of the material . . ."

One proposal suggested shifting the burden of proof from the People to the defendant. This is accomplished by creating a rebuttable presumption of knowledge in the defendant's act of dissemination, etc., and placing the burden on the defendant to overcome the presumption by a "preponderance of evidence" to the contrary. An alternative scheme in the 1957 draft suggested the same rebuttable presumption of "knowledge" but left with the People the burden of proving "scienter" beyond a reasonable doubt. The 1962 Model Penal Code abandoned the first proposal and settled on the latter.

Section 251.4 (2) of the 1962 Model Penal Code provides in part:

"(2) Offenses. Subject to the affirmative defense provided in Subsection (3), a person commits a misdemeanor if he knowingly or recklessly: (a) sells, etc., any obscene writing, etc. . . . A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly . . ." (Our emphasis.)

The *prima facie* presumption voiced in the 1962 draft arises from proof of "possession . . . in the course of business" whereas, under our analysis of *Rosen*, the presumption there would arise from proof of "knowledge

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of the contents." It thus appears that the 1962 draft of the Model Penal Code follows the *Rosen* case, except that by employing "knowingly or recklessly" as the "scienter" requirements, the possibility of acquittal for honest mistake is permitted, as a matter of defense.

Referring to the five categories described in "The Defendant's State of Mind," *supra*, a person would be criminally liable under the 1962 provisions of the Model Penal Code if he were shown to have the state of mind described in categories (1) or (2), (knowingly) or the state of mind described in categories (3) or (4), (recklessly). Conversely, it would be possible for the defendant to gain acquittal, if he were able to establish in his defense that his state of mind was not that of categories (1), (2), (3) or (4) but was that of category (5).

2. MISHKIN'S STRATEGY

Three separate and distinct "scienter" claims are commonly made by defendants in obscenity cases: The first two attack the adequacy of, and the proper construction to be given to the statutory language; the third challenges the adequacy of the evidence at the trial to meet the burden of proof on scienter established by the statutory language employed.

Under the first contention, where the challenge is to the adequacy of the statutory language, the claim is made that the criminal statute, in its definition of the People's burden of proof on the scienter issue, fails to meet the constitutional standards for scienter described in the *Smith* case.

Under the second contention, where the challenge is to the proper construction to be given to the statutory language, the statutory language is conceded to be adequate to meet the constitutional standard for scienter set by *Smith*, but challenge is offered to the meaning of *Smith*, and thus, to the construction to be given to the statutory language employed.

Under the third contention, where the adequacy of the evidence on scienter offered at the trial is challenged, the contention is that the evidence established by the People at the trial does not satisfy the People's burden of proof on scienter, as set forth in the statute.

Where, as in the second contention noted above, there is no challenge to the language of the statute as such, but only to its meaning, the argument will appear as

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a part of the third claim (i. e., that the proof offered at the trial is insufficient to meet the burden of proof imposed by the language of the statute, as interpreted by the defendant). Mishkin's attack on scienter took this form in his appeal. The heading of his argument read, "There is no proof that the defendant knew the books were obscene . . ." (Our emphasis.)

Mishkin's argument, as mentioned at the outset, had two prongs: (1) that the People's burden of proof under the New York statute was to prove beyond a reasonable doubt that the defendant knew (subjectively) that the subject matter was obscene, and (2) that the People's evidence had not met this burden. In his brief, he argued at pages 14 and 15:

"There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic, but that knowledge is not sufficient."

"It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this crime . . ."

". . . nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecutor to justify the suppression of publications, and it is for it to discover the method for sustaining the burden . . ."

This was the same argument that had been made and rejected in *New York v. Finkelstein*, 11 N. Y. 2d 300, 229 N. Y. S. 2d 367, 183 N. E. 2d 661, cert. den. 371 U. S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962), which had twice been before the New York Court of Appeals. In those decisions the New York Court of Appeals had "authoritatively interpreted"²² the scienter requirement of the state obscenity statute, in a manner which was contrary to Mishkin's urging.

(a) An Analysis Of The Two Finkelstein Appeals**(1) The Court of Appeals in 1961 Reads Scienter into the New York Statute.**

The first *Finkelstein* case had been tried before the *Smith* case was decided. The trial judges however did not render their decision until after the United States Su-

²² See Mishkin at page 62.

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preme Court had rendered its decision establishing the scienter requirement. Although Section 1141 of the Penal Law did not have a specific scienter requirement, the trial judges "read" the requirement into the statute and found the defendant guilty. When the case reached the New York Court of Appeals for the first time in *New York v. Finkelstein*, 9 N. Y. 2d 342, 174 N. E. 2d 470 (March 30, 1961), the Court of Appeals "interpreted" the statute to require the "vital element of scienter" which it interpreted as "awareness of the contents," at page 471.

"In *Smith v. People of State of California* . . . the United States Supreme Court declared unconstitutional a Los Angeles City ordinance which proscribed, and was construed to impose strict liability for mere possession of obscene prints, regardless of the offender's awareness of the contents. The New York proscription, on the other hand, neither expressly, nor by our construction here, dispenses with this vital element of scienter, and therefore, in no way impinges upon the traditional freedom guarantees of speech and press (*Roth v. U. S.*) . . ." (Our emphasis.)

Speaking further on the scienter requirement (burden of proof) which the Court had read into the statute in its decision, the Court there said at page 471:

"A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised . . ." (Our emphasis.)

The Court sent the case back for retrial however, feeling that "new trials were warranted by the circumstances and in the interests of justice, so that, although the People have the burden of proof defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious literature in their possession for sale. . . ." (Our emphasis.)

When the case was retried, the defense again offered no testimony and on August 30, 1961, Finkelstein was again convicted. Nine months later the second conviction was before the New York Court of Appeals on the second appeal in *New York v. Finkelstein*, 11 NY 2d 300, 229 NYS 2d 367 (May 17, 1962). This time in his appeal Finkelstein argued contention (2) and conten-

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tion (3), i.e., the People's evidence has failed to meet the burden of proof on scienter, and that the People's burden of proof as he construed the New York Court of Appeals' previous ruling in the first *Finkelstein* case was that of proving specific intent, i.e., that he, Finkelstein, knew that the books were "obscene."³⁹

(2) The Court of Appeals in 1962 Upholds State Evidence as Establishing a Prima Facie Case Under the Scienter Requirements.

The *prima facie* evidence⁴⁰ against Finkelstein was uncomplicated. At the time of Detective Dell's purchase from an employee, Finkelstein, the owner of the store entered. Dell told him, "You know those two books are pornographic." Finkelstein replied, "It all depends on how you look at it. I have seen much worse than this. . ."

In answering Finkelstein's claim regarding the burden of proof and scienter as it was related to the burden of proof, the Court of Appeals stressed the fact that knowledge of the contents of the book had been established, beyond a reasonable doubt, at page 305:

"Both defendants presently contend that the proof failed to establish scienter. In our opinion, however, scienter — 'knowledge by . . . (defendants) of the contents of the books' (*Smith v. California*, 361 U. S. 147, 149, 80 S. Ct. 215, 216, 4 L. Ed. 2d 205) — was sufficiently proved beyond a reasonable doubt. As the Supreme Court of the United States said in *Smith v. California*, *supra*, page 154, 80 S. Ct., 219: 'Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.' The voluntary admission on the part of each defendant that he had seen worse books than those here involved, the lurid statements on the front cover of each paper covered book, taken together, warranted the trial court's con-

³⁹ Finkelstein's brief, pp. 10-13.

⁴⁰ The argument that "recklessness" (category (4)) was not within the "calculated purveyance" requirement of the first *Finkelstein* appeal, was muted by the opinion in the second *Finkelstein* appeal, considering the nature of the *prima facie* evidence.

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clusion that scienter was established beyond a reasonable doubt. . . ." (Our emphasis.)

The U. S. Supreme Court denied Finkelstein's petition for certiorari in *Finkelstein v. New York*, 371 U. S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962).

(b) Mishkin Adopts Finkelstein Approach

The *Mishkin* strategy followed that employed by *Finkelstein*. *Mishkin* did not testify nor did he offer any evidence in his defense.

The People's case against *Mishkin*, however, was in marked contrast to that presented against *Finkelstein*. The transcript of the People's case in chief against *Mishkin* ran to over 500 pages.

On appeal, his main defense, other than that the material was not obscene, was that the scienter requirement voiced by the New York Court of Appeals in the first *Finkelstein* case called for proof of a specific intent that *Mishkin* distributed the materials knowing (subjectively) the materials were obscene, and that the People's evidence did not meet the burden of proof.

In replying to *Mishkin*'s contention regarding the construction to be given to the New York Court of Appeals' language in the two *Finkelstein* cases (cf. contention (2) above), the U. S. Supreme Court was required to construe the manner in which the different language in both cases was employed: one spoke of "aware of the character of the material," the other of "knowledge of the contents."

Pointing to the New York court's remarks in the second *Finkelstein* case which equated "scienter" with "knowledge of the contents" Justice Brennan indicated that the High Court interpreted that language as consistent with, rather than a modification of the New York court's previous scienter interpretation that "only those who are in some manner aware of the character of the material they attempt to distribute should be punished" and that "calculated purveyance of filth is exorcised," voiced in the first *Finkelstein* case. The New York Statute required less than actual subjective knowledge, but more than "innocent" purveyance. In this regard, Justice Brennan cited the scienter requirement of Model Penal Code Section 251.4 (2), and the Commentary, Model Penal Code (Tentative Draft No. 6 1957) 14 at pages 49 to 51, both of which Justice

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Brennan described as expressing a "similar" requirement.⁴¹ Section 215.4 (2) of the Model Penal Code (1962) cited by Justice Brennan provides that: "... a defendant commits a misdemeanor if he knowingly or recklessly . . . sells, etc. . . . obscene matter," and establishes a rebuttable presumption from the fact of possession for sale of obscene matter:

"A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly"

3. SUPREME COURT'S RULINGS ON SCIENTER ISSUES**(a) Proof of Subjective Intent Held Not a Constitutional Requirement—Model Penal Code Provisions Approved**

Having cited Model Penal Code, Section 251.4 (2) as having a scienter requirement "similar" to the New York standard, which it approved, it follows that the Court in *Mishkin* also approved the "knowingly or recklessly" requirement of the Model Penal Code as fulfilling the constitutional requirements.

As noted above, a person would be guilty under the "recklessly" standard of the Model Penal Code either where he purposely avoided making a judgment on the material (category (3)), or where he personally was of the belief that the material was not obscene, but had no reasonable grounds for the belief (category (4)). It therefore is the law that there is no constitutional requirement that the People's evidence show that a defendant knew subjectively that the material was obscene.

(b) Court Again Avoids Issue Of "Honest Mistake"

Justice Brennan, having construed the New York statute to be the equivalent of the Model Penal Code Section 251.4 (2) and, thus to permit the possibility of acquittal for honest mistake as a matter of defense, found the area of doubt reserved in *Smith* beyond challenge, at page 63:

"Appellant's challenge to the validity of Section 1141 founded on *Smith v. California*, 361 U. S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215, is thus foreclosed, and this construction of Section 1141 makes it unnecessary for us to define today 'what sort of mental ele-

⁴¹ See *Mishkin*, p. 63, fn. 9.

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ment is required to a constitutionally permissible prosecution'. Id at 154, 4 L. Ed. 2d at 212 . . ."

Whether "honest mistake" as to whether the contents in fact constitute obscenity need be an excuse as a matter of constitutional principle remains undecided today.

A strong argument can be made that the *Mishkin* Court, in approving the scienter provision of the Model Penal Code and in citing the Commentary to the 1957 draft also gave support to the special presumption therein, inasmuch as the latter is such an integral part of the Model Penal Code scienter scheme.⁴² The Commentary Model Penal Code describes its treatment of scienter on page 50 as:

"Since 'predominant appeal to prurient interest' is a material element of obscenity, the prosecution would have the burden of proving knowledge or recklessness as to this quality of the material . . . we believe it appropriate to have special provision because of the high probability that persons disseminating obscenity do know the contents and quality of what they disseminate and because of the exceptional difficulty of disproving beyond a reasonable doubt a defendant's assertion that the prurient appeal of the accused material was not apparent to him." . . . "Accordingly we propose . . . to establish a presumption."

The facts of the *Finkelstein* case lead one to believe that the Court of Appeals was thinking somewhat along the lines of the drafters of the Model Penal Code when it sent the case back for retrial so that the defendant could come forward with testimony or proof to explain the "presence of salacious literature in their possession." At page 472:

"Although the people have the burden of proof defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious literature in their possession for sale . . ."

For other courts which have seen the wisdom in either an inference or a rebuttable presumption in such cases, see *Minnesota v. Oman*, 261 Minn. 10, 22, 110 N. W. 2d 514, 523 (Sept. 1, 1961); *Connecticut v. Andrews*, 150 Conn. 103, 186 A2d 546, 552 (Nov. 6, 1962); *New Jersey*

⁴² See note 34, *supra*. The adequacy of the People's proof, however, did not depend upon the existence of a presumption.

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v. Hudson County News Co., 41 N. H. 247, 196 A2d 225, 231 (Dec. 13, 1963); *State v. Miller*, 145 W. Va. 59, 112 SE2d 472, 478.

(c) Court Holds Evidence Meets States Burden Of Proof Under The New York Statute

Having concluded *Mishkin*'s first argument against him, Justice Brennan reviewed the People's evidence and ruled his second claim, i.e., the evidence did not meet the People's burden of proof, was also without merit, at page 63:

"Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, high-lighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that appellant 'was aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth.'"

D.

**MAJORITY OPINION CITES A. L. I. M P. C.
FOUR TIMES WITH APPROVAL**

The Court in its majority opinion in *Ginzburg* had occasion, in three additional instances, to cite with approval the American Law Institute, Model Penal Code and its concepts. Those who, after reading the *Mishkin*, *Ginzburg*, and *Fanny Hill* decisions, are unable to chart the path which the majority of the United States Supreme Court are taking out of the "thicket" would do well to look to the following Model Penal Code references, cited by the Court in its footnotes:

1. Tentative Draft No. 6 (May 6, 1957), A.L.I., Model Penal Code, pages 1-3, 13-17, 45-46, 49-51, 53.
2. Proposed Official Draft, Model Penal Code, Sections 251.4 (2) and (4) and comments thereto.

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3. Schwartz, Moral Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677-681 (1963).

It should be borne in mind, in relating the *Fanny Hill* opinions to the Model Penal Code concepts, that the latter was not drafted with civil proceedings in mind. The reporter to the 1957 draft comments at page 54:

"The Model Penal Code deals exclusively with the use of afflictive sanctions to promote public policy. We therefore do not undertake to pass judgment on various non-penal measures that are employed or proposed to suppress obscenity, such as: civil determination of the issue of obscenity through injunction or declaratory judgment proceedings. . . ."

As noted by Louis B. Schwartz, co-reporter for the Model Penal Code, in the above law review article, the American Law Institute, in drafting the Model Penal Code, blended both "constant" and "variable" concepts. "Variable" obscenity concepts are employed in its provisions dealing with distributions to children and specially susceptible audiences. In other situations, it adheres to "constant" obscenity concepts, utilizing the "average person" in the determination of obscenity *vel non*, but providing explicit exemptions for justifiable transactions in the obscene (transactions by persons with scholarly, scientific, or other legitimate interests in the obscene).

The Model Penal Code "hybrid" approach differs from the straight variable approach in that the latter, instead of holding material obscene and granting an exemption because of the nature of the transaction (scholarship, etc.), would hold the material not obscene under the circumstances. See *U. S. v. 31 Photographs* (*supra*).

If there is an indication of any tendency of the *Mishkin* majority court to detour from the approach used in the Model Penal Code, it is that Justices Brennan, Warren, and Fortas may be reluctant to commit themselves fully, in civil cases dealing with obscenity *vel non*, to the Model Code provisions which follow "constant" concepts. There are indications of this in the approach they adopted in their *Fanny Hill* opinion.

On the other hand, Justices Clark and White followed the "constant" obscenity aspects of the Model Penal

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Code, even though the matter under review was not a criminal case. Their opinions, which we roundly applaud and in which we find no fault, would have been more encompassing had they reduced to writing that which their silence gave testimony of regarding the issue raised in the Brennan-Warren-Fortas opinion. In this regard, they need only have added an additional sentence, such as, "To upset the judgment of the lower court by anticipating an attempt on the part of the Commonwealth to use this decree to apply criminal sanctions to those activities which might have occasion to use the subject matter for legitimate purposes would serve no useful purpose." Neither Justice, however, saw any reason for anticipating any difficulties in applying the Massachusetts criminal laws to those situations where exemption might properly attach. In fact, in replying to the Brennan-Warren-Fortas opinion, they completely ignored the subject.

E.**THE CONSTITUTIONAL CRITERIA ARE NOT APPLIED INDEPENDENTLY IN CRIMINAL CASES**

The Brennan-Warren-Fortas requirement, voiced in their *Fanny Hill* opinion at page 6 that:

. . . A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. *Each of the three federal constitutional criteria is to be applied independently.* . . . (Our emphasis.)

is not so startling when one considers that the Court in *Fanny Hill* was reviewing an injunctive decree rather than a criminal conviction.⁴³

It does not follow, however, that the criteria are applied independently in criminal cases, nor does it mean that where there is a proper finding in a criminal case that the appeal is to prurient interest (which, as defined in the Model Penal Code, includes patent offensiveness) the subject matter may still have redeeming social im-

⁴³ Although Justice Brennan drew attention to this distinction in footnote 3 of his opinion, the reference was largely ineffectual, judging from the initial analysis of the opinion by many of the judges and prosecutors.

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portance under the circumstances at issue. In a criminal case, a finding of social importance would necessarily be inconsistent with the finding that the prurient interest test had been met.

In the review of an injunction, the United States Supreme Court is confronted by a decree forbidding *all* distributions and encompassing a myriad of fact situations. A criminal conviction embraces one given set of facts. The broad scope of the inquiry in an injunction situation requires that the tests be applied independently, so that *all* factual situations are considered.

For example, assuming slight historical value, as hypothesized by the Massachusetts Supreme Court⁴⁴ — what of the possible distributions to literateurs who might wish to study *Fanny Hill* for its historical significance in the development of the English novel, or the sociologists, who might have occasion to refer to it in their studies, or attorneys who might study it in connection with efforts to arrest the spread of pornography? Were those distributions to be permitted under the decree?

It is important to bear in mind that the Massachusetts statutes under consideration by the High Court, both criminal and civil, allowed no specific exemptions

⁴⁴ We do not understand the Massachusetts Supreme Court to have so found. The Court said, "We are mindful that there was expert testimony, much of which was strained, to the effect that *Memoirs* is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony *may* indicate this book has some minimal literary value does not mean it is of any social importance. . . ." (Our emphasis.) The Massachusetts Supreme Judicial Court could still, without further evidence, find no historical or literary value and supply the missing ingredient of "utterly without social value." The trial court judge did just this in *G. P. Putnam's Sons v. Calissi*, 86 N. J. Super. 82, 95, 205 A. 2d 913, Judge Pashman said, "Those who contend that *Fanny Hill* is a work of literary value because it affords insight into the life and manners of mid-18th century London must necessarily have an overwhelming sense of humor. Resort to *Fanny Hill* to study or authenticate the mores of those times would be the nadir of research. . ."

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or defenses for situations which did not involve "pandering." Compare in this regard, the A.L.I. recommendations contained in Section 207.10 (4) (c) of the Model Penal Code (1957 draft) which provides:

The following shall not be criminal offenses under this section. . .

(c) Dissemination to institutions or individuals having scientific or other special justification for possessing such material . . .

Moreover, the Massachusetts statutory procedure authorized "collateral uses" of the injunctive decree, which further gave the impression of inhibiting legitimate use of the book.⁴⁵ Footnote 4 of the Brennan-Warren-Fortas opinion noted that Section 28H of the Massachusetts injunctive statute, made a decree that a book was obscene "admissible in evidence" in a criminal prosecution under Section 28B and provided that "if prior to such offense a final decree had been entered against the book, the defendant, if the book be obscene . . . shall be 'conclusively presumed to have known' "the book to be obscene. Justice Brennan's opinion noted at footnote 5 that such "collateral uses of the declaration" would have a "serious inhibiting effect on the distribution (legitimate) of the book. . ."

Under a strict interpretation of the Massachusetts statutes, the distributions noted above (to literateurs, sociologists, etc.) would have been barred by the Massachusetts decree. To draw in focus the constitutional issue underscored by the Brennan-Warren-Fortas opinion, one need only compare in contrast the results which should follow in the criminal forum, were the same factual situation to exist. Such distributions are not a violation of the obscenity laws. There is absent the intent to pander. The predominant appeal of the material is not to prurient interest, but rather, to a legitimate social purpose which has social value.

⁴⁵ Once again, assuming the book in issue has legitimate uses.

⁴⁶ Section 28B made the distribution, etc. of a book, knowing it to be obscene, a criminal offense. The A.L.I. severely criticizes the "conclusive presumption" of the Massachusetts procedure. See note 4.

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Had the Massachusetts statutory scheme authorized a defense or exception for such situations, the Brennan-Warren-Fortas opinion would not have been necessary and the split of the justices that constituted the majority of the Court in *Mishkin* might never have occurred. At the very least, that trio of justices would have been forced to come to grips with the larger issue.

The failure of the Massachusetts statutory procedure to authorize specific exemptions offered the three justices a collateral issue upon which to cast their vote. We cannot fault the opinion on this ground, however, inasmuch as the rationale is basically sound, even though the supporting facts for the "parry" indicate a great deal of grasping for straws, as noted by Justice Clark in his dissent. The probabilities are that the opinion, properly understood, may do much toward unraveling the misunderstandings which surround many of the Court's past decisions.

Our criticism, however, is directed not at the rationale, with which we take no issue, but rather at the manner in which it was expressed—or more precisely, what it left unexpressed. The opinion fails to express the obvious—that the theory of "independent" tests, relating as it does to variable obscenity concepts, has limited application to the injunctive type proceeding and is not to be carried over and applied carte blanche in criminal areas. If the three justices are to be consistent, they would have to agree that in a criminal case the "dominant theme, prurient appeal" test and "social value" test coincide, so that in the criminal forum there is but one, and not several independent tests. It should be noted that, in reviewing the book *Housewife's Handbook on Selective Promiscuity*, the majority in *Ginzburg* did not apply the social value test independently, but rather considered only the predominant appeal of the material in the light of the precise facts being reviewed.⁴⁷

In criminal cases, it is at complete odds with the "variable" concept expressed by the majority opinion in *Mishkin* and *Ginzburg* to say either that the "utterly

⁴⁷ The Court said, at page 39: "... we cannot conclude that the court below erred in taking their own evaluations of its face value and declaring the book as a whole obscene despite the other evidence. . . ." (Our emphasis.)

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without redeeming social value" phrase is an independent test, or that it is a necessary part of the definition of "obscene." If the dominant appeal of the material is aimed at prurient interests as defined in the Model Penal Code, then the conduct is in the area of criminal activity and the subject matter is utterly without redeeming social importance under the circumstances. In criminal cases, unlike the situation which exists in injunction cases, a specific set of facts are in issue and the two tests are equivalents.

If the variable approach to obscenity is to be followed, then it must follow that it is not the subject matter itself which is "utterly without social importance," but rather the manner in which the subject matter is employed.⁴⁸ The social value factor in a criminal trial can more properly be stated in the form of a jury instruction relating to conduct; such as:

"In order to find the defendant guilty of the charge, you must find that the circumstances under which the material was presented and disseminated in the market place by the defendant was utterly without redeeming social importance . . ."

F.**"FANNY HILL" WAS NOT CLEARED BY THE COURT**

In recognition of the practical "facts of life" surrounding the publication of *Fanny Hill*, the Justices Brennan-Warren-Fortas opinion went on to say:

"It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances. . . . Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. . . ."

⁴⁸ See *Ginzburg*, at page 38: "And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. . . ."

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To grasp the full significance of this language requires an understanding of additional facts surrounding the recent publications of *Fanny Hill*.

Prior to May of 1963, *Fanny Hill* had been printed and distributed only by fly-by-night pornographers in under-the-counter transactions. Typical of this operation was that of Richard J. Haddad in Los Angeles, California. When on November 30, 1962, the Los Angeles Sheriff's vice squad raided his operation, he was found to be printing and distributing three classifications of obscene matter: The first of these was sado-masochistic material such as *Bound in Rubber*, *Female Sultan*, *White and Lash*, *Bondage Slave*, and *Bondage Discipline at Boadhaven*. A step lower, he reproduced paperbacks like *Sex Life of a Cop*, *Rape Me Again*, and *Incest for Renee*. At the bottom of the ladder were the paperbacks *Devil's Advocate*, *Head Humper*, *Down She Goes*, *Venus in India*, *Memoirs of Josephine Mitzerbacker*, and *Memoirs of Fanny Hill*. *Fanny Hill* did not get into publication in Los Angeles in November, 1962—but only because of the action of the Sheriff's office which stopped the operations with the arrest of Richard Haddad.

Six months later, however, G. P. Putnam's Sons, in pressing the line between candor and shame,⁴⁹ introduced a hard-back cover of *Fanny Hill* in over-the-counter sales, with a first-print run of 7,000 copies. Later printing of the hard cover was to run this number up to about 40,000 copies.⁵⁰ Before the year ended, Putnam's Sons brought out its paperback edition.

The California and New York smut industry was not to be outdone.

Running in competition with the paperback edition of Putnam's Sons in late 1963 was the Brandon House edition of *Fanny Hill* (BH901), printed and distributed by Milton Luros⁵¹ of 7311 Fulton Avenue, North Holly-

⁴⁹ In recent years, Putnam's Sons has published such erotica as *Candy*, *Krafft-Ebbings Psychopatia Sexualis*, *Perfumed Garden*, and *Ananga Ranga*.

⁵⁰ Testimony of Walter Minton, president of Putnam's Sons, in *Illinois v. Paul Romaine* (criminal prosecution for sale of *Fanny Hill* in Chicago, Illinois).

⁵¹ On Friday, January 14, 1966, Milton Luros and eight of his associates were convicted by a federal jury in Sioux City, Iowa, of mailing and shipping 14 obscene nudist magazines and six lesbian-type paperback books into Iowa. See NDR, Special Edition, Vol. III, No. 3, of March, 1966.

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wood, California, also a publisher of girlie magazines, nudist magazines, and sex (predominantly lesbian type) paperbacks.

Edwin A. Schnepf of 10539 Burbank Boulevard, North Hollywood, California, also a publisher of girlie magazines, nudist magazines, sex tabloids, and sex paperback books⁵² placed his *Fanny Hill* edition on the market also, (All Star 10). It followed *Route 69* (AS 9) and in turn was followed by *The Love Teacher* (AS 11) and *Lesbo Hotel* (AS 12).

Fitz Publishing Co. of Los Angeles, distributed nationally by Golden State News (GSN), which also distributes girlie magazines, nudist magazines, and sex paperback books also brought out its paperback edition.

New York smut publishers followed the lead of the California industry with their own editions.

A number of police actions followed. In July of 1963, the Corporate Counsel of the City of New York and a group of New York County District Attorneys sought an injunction against its sale in New York.⁵³ On July 31, 1963, a Chicago Grand Jury returned a criminal indictment against Paul Romaine for the sale of Putnam's Sons hard-cover edition of *Fanny Hill*.⁵⁴ On February 10, 1964, the Attorney General of Massachusetts filed a petition in the Superior Court requesting the Court to hold the Putnam's Sons paperback edition of *Fanny Hill* to be obscene and enjoin its sale in Massachusetts. On February 14, 1964, the Attorney General of Rhode Island filed an *in rem* civil action against the *Fanny Hill* edition published by Milton Luros.⁵⁵ In April and

⁵² In March, 1965, a Los Angeles Superior Court jury held five All Star paperback books which were submitted to it to be obscene. *California v. Schnepf*, S. C. 289205. The titles were *Beds of Canyon Grove* (AS 3), *Sin Island* (AS 4), *Women of Beaver Mountain* (AS 6), *Suburban Sexpot* (AS 8), and *The Love Teacher* (AS 11).

⁵³ On July 10, 1964, the Court of Appeals denied the injunction in a four-three decision.

⁵⁴ *People of the State of Illinois v. Paul Romaine* (unreported, in the Circuit Court of Cook County, Criminal Division). On April 30, 1965, the jury entered a guilty verdict. The case is currently on appeal.

⁵⁵ *J. Joseph Nugent, Attorney General of Rhode Island v. Fanny Hill* (Providence, Plantation Superior Court M. P. 6467). On February 27, 1964, Judge John E. Mullin entered a temporary restraining order against its distribution. The publisher did not file an answer until January 19, 1965. The case is pending.

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October of 1964, criminal proceedings against the All Star and Brandon House *Fanny Hill* versions were filed by the District Attorney of Los Angeles County.⁵⁶ When the Bergen County, New Jersey, Prosecutor threatened criminal prosecution, the publisher brought a civil action asking for injunctive relief.⁵⁷ In some areas, the book was withheld from distribution under threat of prosecution.

When the remarks of Justice Brennan are considered in the light of the publishing history of *Fanny Hill*, noted above, it is abundantly clear that such distributions of the book are prosecutable under the state obscenity statutes.

⁵⁶ A newly elected Los Angeles County District Attorney dismissed the charges against the All Star and Brandon House *Fanny Hill* editions following his election in November, 1964.

⁵⁷ *G. P. Putnam's Sons, a corp. v. Guy W. Calissi, Bergen County Prosecutor*. On December 7, 1964, Judge Pashman held the book to be obscene, 86 N. J. Super. 82, 205 A. 2d 913. The case is presently on appeal.

CONCLUSION

In *Ginzburg* and *Mishkin*, a solid majority of the Court made it impossible for the reluctant prosecutor to explain away his continuing failure to carry out his duties under the obscenity laws. No longer can he place the blame upon the High Court and the confusion alleged to have been engendered by its past decisions.

Defense arguments based upon the "hard-core" myth and a subjective knowledge requirement have been swept from the courtroom.

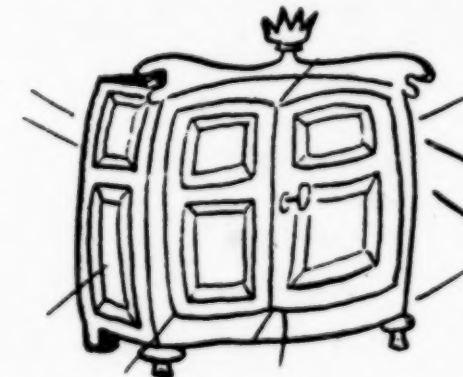
In these three decisions, the High Court has charted the prosecutor's blueprint for success. The directive is crystal-clear. The proper forum is the criminal courts. The attack should be against the conduct of the defendant in violating recognized community standards.

The Emperor's New Clothes

Many years ago there was an Emperor who was so extremely fond of beautiful new clothes that he spent all his money on being superbly dressed. He took no interest in his army and it was only to show off his new clothes that he went to the theatre

or for a drive in the country. He had a garment for every hour of the day, and just as you may say of a king, "He's in his council," it was always said of this Emperor, "He's in his wardrobe".

The big city, where he lived, was full of life and activity, and strangers were continually arriving. One day two swindlers turned up; they pretended to be weavers and claimed that they knew how to weave the most beautiful

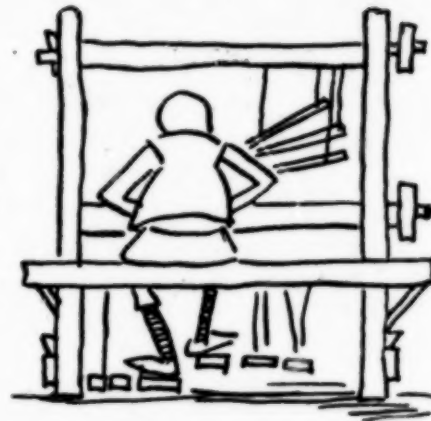




materials imaginable. Not only were shades and patterns of a rare beauty, but the clothes made from this fabric had the strange quality of being invisible to any person who wasn't fit for his position or else was stupid beyond excuse.

"Why! They must be wonderful clothes," said the Emperor to himself, "wearing them I could find out if any of the men I employ are unfit for their post, and I can distinguish between the clever and the stupid. Yes, they must weave that cloth for me at once." Then he gave them a lot of money in advance so that they could begin to work.

At once they put up two looms and pretended to be working, though in fact the loom was quite empty. They had the cheek to demand the purest silk and the costliest gold thread,



which they tucked away in their own bags, and then set to work on the empty looms and that until the small hours of the night.

"Now I should like to know how they are getting on with the cloth," thought the Emperor, but he did feel rather ill at ease knowing that those who were stupid or unfit for



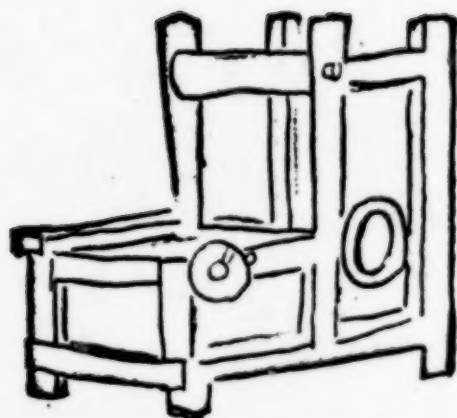
their post wouldn't be able to see it. Still, for his own part he was confident that he didn't need to worry, but all the same he would rather send someone else first to see how things were. All over the town people knew about the magic power of this cloth, and they were all keen on seeing how incapable or stupid their neighbours were.



"I'll send my honest old premier to the weavers," thought the Emperor, "he's the best one to see what the material looks like, for he's clever, and nobody could be better suited to his post than he is."

Now the kind old premier entered the hall where the two swindlers sat working the empty looms. "Good gracious me!"





thought the old premier opening his eyes wide, "I can't see anything."

But of course he didn't say so.

The two swindlers invited him to inspect the loom and asked if he didn't find the colours and the design quite perfect? They pointed to the empty loom, and the poor

old premier opened his eyes even wider than before, but he couldn't see anything — for there wasn't anything to be seen. "Dear me," he thought, "Could I really be stupid? I never thought so, no one must get to know! Could it be that I am not fit for my post? No, it'll never do to tell them that I can't see the cloth."

"Well, what is your opinion?" asked the one who was pretending to weave.



"Oh, it's so pretty, quite ravishing," said the old premier looking through his glasses, "what a design and what colours! Indeed, I'll tell the Emperor that I'm very satisfied."

"Ah, we're pleased to hear that," said the two weavers, and now they named the colours and explained the un-



sual design. The old premier listened carefully that he might be able to repeat everything to the Emperor, and so he did.

Now the swindlers demanded more money, and more silk, and more gold thread; they needed it for the weaving. Everything went straight into their own pockets, not a thread was placed in the loom, but still they continued as before, working the empty loom.

Soon after the Emperor sent another honest official to see how the weaving was getting on, and whether the cloth would be ready soon. He had the very same experience as the premier, he looked and looked, but as there was nothing but the empty



looms, he saw nothing. — "Look, isn't it an attractive piece of cloth?" asked the two swindlers, and they carefully explained the magnificent design which wasn't there at all.

"I know I'm not stupid," thought the man, "so it must be my good position I'm unfit for. That's very strange, but I mustn't let anyone know." So he praised the cloth that he didn't see, and he expressed his delight in the beautiful colours and

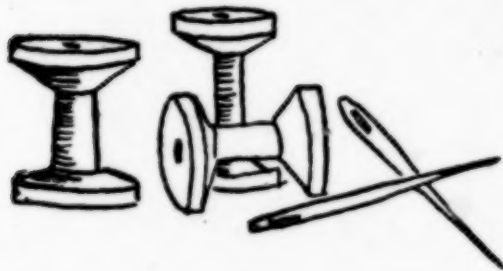
the wonderful design. "Yes, it is unbelievably lovely," he told the Emperor.

The whole town was now discussing this splendid material.

Now the Emperor decided to see it himself, while it was still in the loom. Together with several select people — a-

mong them the two honest, old officials who had been there before — he went to see the cunning swindlers who were now weaving with all their might, but still without thread.

"Look, isn't it magnificent?" said the two honest officials.



"Have Your Majesty seen the pattern, the colouring!" Then they pointed to the empty loom, because they thought that all the other people could see the material.



"What ever is this?" thought the Emperor, "I can't see a thing! This is terrible, am I really stupid? Am I not fit to be Emperor? This is the most frightful thing that



could happen to me!" — "Why yes, it is very beautiful," the Emperor said, "it has my imperial approval." And he gave a benevolent nod as he looked at the empty loom; he wouldn't admit that he couldn't see anything. His entire escort gazed and gazed, but they made no more of it than all the others, but like the Emperor they all exclaimed, "How very beautiful!" Now they advised him to have a garment cut from this wonderful material and wear it for the first time in the grand procession that was to take place very soon. "It's magnificent, superb, out-





standing!" they all said to one another, and they were all incredibly pleased with it. The Emperor conferred a knighthood on each of the swindlers and gave them a cross to wear in their button-

holes as well as title of Imperial Weavers.

The entire night preceding the procession the swindlers sat working with more than sixteen candles lit. People could see they were busy getting the Emperor's new clothes ready. They pretended to take the material off the loom, they cut away at the air with big scissors, and they sewed with needles without thread, and at last they declared, "Look! The clothes are all ready now."



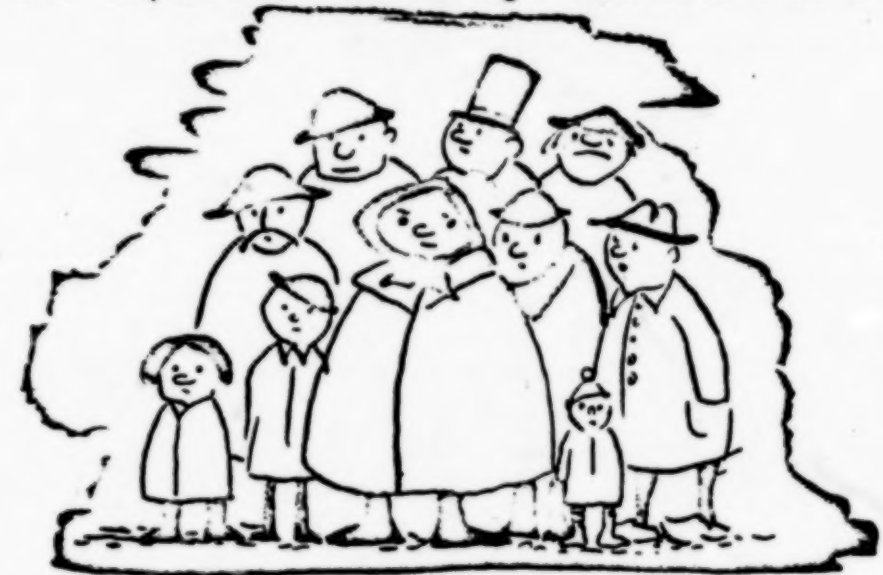
The Emperor went personally to the weavers escorted by the most distinguished courtiers, and the two swindlers each held out their arm as if they were holding something and said, "Look, here are the breeches — here is the robe — here is the mantle." And so on. "They are all as light as gossamer, you can hardly feel that you are wearing anything, but that's just the fine thing about them.

"To be sure", said all the courtiers, but they couldn't see a thing, for there wasn't a thing to be seen.

"If now Your Imperial Majesty most graciously will take off your clothes," the swindlers said, "then we'll fit you with the new ones in front of the big looking-glass."

The Emperor took off his clothes, and the swindlers pretended to hand him one by one the new garments they were supposed to have made, and they pretended to be fastening something at his waist — it was the train, and the Emperor turned and twisted in front of the glass.

"Heavens, how well they suit Your Majesty, and what a perfect cut!" they all said. "What a design! What colours! What a



precious garment!" — "They are waiting outside with the canopy that is to be carried above Your Majesty in the procession," announced the Master of Ceremonies.

"Good", said the Emperor, "I'm quite ready." "Isn't it a perfect cut?" And he turned round once more in front of the glass to give them the impression that he really was admiring his fine garment.

The chamberlains who were to carry the train fumbled about on the floor as if they were picking up the train. They walked along with outstretched hands in order to hide the fact that they couldn't see anything.

Now the Emperor was walking in the procession under the beautiful canopy, and all the people in the street and at the windows cried, "Goodness, how the Emperor's new clothes look marvellous! What a splendid train on his mantle! What a perfect fit!" Nobody would admit that he didn't see anything, because that was as good as saying that he wasn't fit for his job or else that he was stupid. Never before had the Emperor's clothes been such a success.

"But he hasn't got anything on!" cried a little child. "Gracious me, did you hear what this innocent child said?" exclaimed the father, and they whispered from one to the other what the child had said.

"He hasn't got anything on! A little child is saying that he hasn't got anything on!"

"Why! He hasn't got anything on!" everybody shouted at last. The Emperor felt terribly embarrassed, for it seemed to him that people were right, but he thought to himself, "I've got to go through with the procession." And he carried himself even more proudly, and his chamberlains walked behind him carrying the train that wasn't there.